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United States  
Circuit Court of Appeals

For the Ninth Circuit.

NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Appellant.

OLIVIA WAGNER, as Administratrix with the  
Will Annexed of the Estate of Nick Wagner,  
Deceased,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 432

Upon Appeal from the District Court of the  
United States for the District of Montana.

FILED

JUL 25 1935

PAUL P. O'BRIEN,

CLERK







United States  
Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Wibaux, Montana.

Attorneys for Plaintiff and Appellee. [1\*]

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In the District Court of the United States in and  
for the District of Montana.

No. 566.

OLIVIA WAGNER, as Administratrix with the  
Will annexed of the Estate of NICK WAG-  
NER, deceased,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a corporation,

Defendant.

BE IT REMEMBERED, that the Transcript of  
Removal in this case, under the title of Nick Wag-

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\*Page numbering appearing at the foot of page of original certified  
Transcript of Record.

ner vs. Northern Pacific Railway Company, was duly filed in this court on March 27th, 1931, being in the words and figures following, to wit: [2]

In the District Court of the Seventh Judicial District of the State of Montana, in and for the County of Wibaux.

NICK WAGNER,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a corporation, M. L. HARE and JOHN  
PRESTHUS,

Defendants.

### COMPLAINT.

Plaintiff complains and alleges:

#### I.

That at all times herein mentioned the defendant corporation was and now is a corporation, organized and existing under and by virtue of the laws of the State of Wisconsin, operating a railroad from Duluth, Minnesota, to Tacoma, Washington, through the Town of Wibaux, in Montana, crossing at about right angles in said Town of Wibaux for 30 years previous to June 7, 1929, Beaver Creek, a river flowing from South to North with a water shed of 720 square miles up stream from where the said



railroad crosses it in Wibaux, and a length of about 40 miles above said railroad, and all of said water shed above said railroad being for all said 30 years completely barren of trees (except a few cottonwoods and box elders averaging less than one to the acre) and being almost entirely barren of any obstructions to the free flow of water out of said water shed rapidly when it falls and said Beaver Creek at all such times having seventeen, or more, tributaries in the water shed, all with no obstructions to the fast flow of water from there to the main stream.

## II.

That the said Railroad on and for 10 years prior to June 7, 1929 crossed the Valley at Beaver Creek (in which the Town of Wibaux is situated now, for 20 years partly north of the said track and partly south of said track) on an embankment maintained by defendants [3] about 4000 feet long and about 15 feet high above the flood plane, i.e. the Valley level of said Beaver Creek where it is crossed by said railroad, said embankment being gradually less in height above said valley level or flood plane until it reaches the sides of said valley, the said Town of Wibaux and the properties of this Plaintiff, hereinafter described, being on the level of said valley and on said flood plane and safe from high water of said Beaver Creek except for the negligent construction and acts of the defendants as herein set out.

## III.

That at all times herein set out from June 1928 to June 7, 1929, as Plaintiff is informed and believes M. L. Hare was and now is Master of the road bed and ways of said defendant corporation for the portion crossing said Valley and with authority from said corporation to change any negligent or dangerous permanent construction. That such M. L. Hare is a citizen of Montana. That for 10 years before June 7, 1929, Plaintiff is informed and believes John Presthus was and now is a section foreman of the said defendant corporation over the section embracing that portion of the said corporation's road crossing Beaver Creek Valley and with power and authority from said Defendant corporation to change or remedy any negligent or dangerous permanent condition on said road bed, and he the said John Presthus at all times herein mentioned has been and now is a citizen of Montana, and this Plaintiff is a citizen of Montana.

## IV.

That in May and June of almost every year for 10 years previous to June 7, 1929, Beaver Creek, at other seasons a small harmless creek, rose to the knowledge of said defendants in its flow and volume to several thousand times its usual flow and would usually rise right to its flood plane, i.e. the valley level at Wibaux, Montana; that the defendants, if they had exercised reasonable prudence would have known and they did know that in all

human probability a flood of the size of the one hereinafter described as of June 7, 1929, would arise in the ordinary course of nature, would cover with a shallow harmless sheet of water the flood plane where the Town of Wibaux is situated and that if the flow of water over the flood plane were obstructed by the said embankment that water seven feet or more deep would [4] accumulate south of said track over the said flood plane and throughout the said Town of Wibaux having 612 people, and around the property of Plaintiff in said town.

## V.

That in June 1921 a flood occurred and in other years floods have here occurred causing rise of water within six inches as high on defendants said embankment as that of June 7, 1929, and shortly after each of said floods the Town Council of Wibaux and the Commercial Club of the Town of Wibaux, a responsible civic body, both notified the defendants of the negligent and dangerous condition of the said embankment as hereinafter set out and of the insufficiency of openings in the same, for water on the flood plane to flow unobstructed, and these notices were given in ample time for the said defendants to have made safe said embankment and made sufficient apertures for the flow of the said water on the flood plane to avoid and prevent the damming up and accumulation of water which came on June 7, 1929, and which defendants should have expected and if they had acted as rea-



sonable persons would have expected and which they did expect.

## VI.

That the said defendants in spite of such notice for eight years prior to June 7, 1929, and on the said day had negligently failed to provide more than two small apertures through said embankment for the running of water of said river or creek in the channel and on the flood plane, and through the negligence of said defendants during all such time one of said openings was only about 75 feet wide at the bridge over the said Beaver Creek, and narrower than the channel thereof at low water, and the other was only about 25 feet wide, (and not intended for an aperture for water at all), and was a viaduct for the main street of Wibaux, Montana; that through the negligence of all the said defendants the aperture at the bridge was insufficient to permit the free flow of said water in a safe shallow sheet on the flood plane in ordinary seasonally recurring high water and because of such negligent conduct and negligent damming by defendants of these waters of Beaver Creek, always a natural water course, with said embankment without any sufficient openings to permit such expected high water to flow unobstructed, the said natural water course was choked at [5] the bridge as it would not have been had sufficient opening been left there for said waters, to-wit: Three times as long as what was made and left there by the said defendants and because of some or all of such neg-

ligent acts of defendants dirty, silty water accumulated to great depths, to-wit: Seven feet or more over, around and in all that part of Wibaux south of the said embankment, and this water running around westerly in great volume through the Town was blocked and dammed for about six hours by the embankment before it broke down, the said embankment on both sides of said viaduct and at the bridge and rushed out.

## VII.

By reason of said negligent acts of defendants, Plaintiff's property situated in Wibaux south of said embankment and said track was covered and flooded and saturated with and carried away by dirty, silty water in the manner and to the extent and loss and damage as follows, to-wit: Plaintiff owned and possessed a stock of mens and boys clothing and cloths and rubber goods and haberdashery situate in the said flood at the Northeast corner of Wibaux Street and First Avenue South in Wibaux Town, Wibaux County, Montana, of the value of more than Eighteen Thousand Dollars; that the said flood caught, soaked, carried away and caused to be forever lost, and permanently damaged and impaired and lessened in value the said stock to the amount of and detriment to Plaintiff of Fifteen Thousand Dollars, no part of which has ever been paid.

Wherefore Plaintiff demands judgment against defendants for the sum of Fifteen Thousand Dol-

lars and for interest thereon at eight per cent per annum from June 8th, 1929, until paid and for costs of suit.

H. L. MAURY

THOMAS C. COLTON

Attorneys for Plaintiff.

State of Montana

County of Wibaux—ss.

Nick Wagner being duly sworn on his oath does say: I am the Plaintiff in the foregoing complaint named; I have read the same, the same is true of my own knowledge except as to the matters stated on information and belief and as to such matters I believe it to be true.

NICK WAGNER

Subscribed and sworn to before me this 29th day of January, 1931.

[Seal]

THOMAS C. COLTON

Notary Public for the State of  
Montana, Residing at Wibaux,  
Montana.

My commission expires Dec. 30th, 1933. [6]



[Title of Court and Cause.]

PETITION FOR REMOVAL OF CAUSE TO  
FEDERAL COURT.

To the Honorable, the District Court of the Seventh  
Judicial District of the State of Montana, in  
and for the County of Wibaux.

The petition of Northern Pacific Railway Company, one of the defendants in said above-entitled cause, respectfully shows and represents:

1. That your petitioner is one of the defendants in said above-entitled action, which said action was commenced in said Court on the 5th day of February, 1931, by the said plaintiff and against your petitioner and its said co-defendants, M. L. Hare and John Presthus, and is now pending in said court, for the recovery of the sum of \$15,000.00 damages, with interest thereon from the 8th day of June, 1929, on account of the destruction of, and injury to, certain property belonging to said plaintiff, at Wibaux, Wibaux County, Montana, by reason of a flood caused by the alleged negligence of said defendants in the particulars charged in plaintiff's complaint.

2. That the grounds upon which the said plaintiff bases his right to recover said damages from said defendants, as set forth [7] in said complaint, are in substance that this petitioner's railroad, for ten years prior to the 7th day of June, 1929, crossed the valley of Beaver Creek, in which the town of Wibaux is situated, on an embankment

about 4000 feet long and about 15 feet high above the flood plane of said Beaver Creek, where it is crossed by said railroad. That in May and June of almost every year for ten years previous to June 7, 1929, said Beaver Creek, at other seasons a small harmless creek, rose to defendants' knowledge in its flow and volume to several thousand times its usual flow and would usually rise right to its flood plane at Wibaux, Montana. That in the exercise of reasonable prudence, defendants would have known and did know that in all human probability a flood of the size of June 7, 1929, would arise in the ordinary course of nature, would cover with water the flood plane where the town of Wibaux is situated, and if obstructed by said embankment, water seven feet or more deep would accumulate south of the railroad track and throughout said town of Wibaux, and around plaintiff's property. That defendants, shortly after each of said floods prior to 1929, were notified by the Town Council of Wibaux and the Wibaux Commercial Club of the negligent and dangerous condition of said embankment and the insufficiency of the openings therein for water on the flood plane to flow unobstructed, in ample time for defendants to make said embankment safe, and make sufficient openings for the flow of the water on the flood plane to avoid and prevent the damming up and accumulation of water on June 7, 1929. That in spite of such notice for eight years prior to June 7, 1929, and on said day, defendants failed to provide more than

two openings through said embankment, and through their negligence during all of said time, one of said openings was only 75 feet wide, and the other only 25 feet wide, and insufficient to furnish the free flow of said water in a safe, shallow sheet on the flood plane in ordinary seasonally recurring high water, because of which the natural water course of Beaver [8] Creek was choked at the bridge, which would not have occurred had sufficient openings been left there for said waters and accumulated dirty, silty water to a depth of seven (7) feet around and in all that part of Wibaux south of said embankment, and blocked by said embankment for about six (6) hours before it broke down.

With reference to your petitioner's company defendant M. L. Hare, it is alleged, on plaintiff's information and belief, that the said Hare from June, 1928, to June 7, 1929, was and still is Master of the Road bed and way of your petitioner for the portion crossing said valley, with authority from your petitioner to change any negligent or dangerous construction; and as to defendant John Presthus, it is alleged, on plaintiff's information and belief, that the said Presthus, for ten (10) years before June 7, 1929, was and still is a section foreman of your petitioner over the section embracing that part of your petitioner's railroad crossing Bear Creek valley, with power and authority from your petitioner to change or remedy any negligent or dangerous permanent condition on said road bed.



3. That your petitioner disputes said plaintiff's claim and denies any and all liability on account of the alleged destruction of, and injury to, his said property. That there is in said action a controversy wholly between citizens of different states which can be fully determined as between them, that is to say, between your petitioner, Northern Pacific Railway Company, and the said plaintiff, Nick Wagner. That at the time of the commencement of this action, the said plaintiff was, ever since has been and now is a resident and citizen of the State of Montana; that this petitioning defendant, at the time of the commencement of this action, was, ever since has been, and is now a corporation incorporated, organized and existing under the laws of the State of Wisconsin, and a citizen of said State of Wisconsin, and this petitioning defendant's said co-defendants, M. L. Hare and John Presthus, at the time of the commencement of this action were, ever since have been, and they are now residents and citizens of the State of Montana. [9]

4. That this action is of a civil nature and the matter and amount in dispute in said cause exceed, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

5. That there is in said action a separable controversy wholly between the said plaintiff and your petitioner, Northern Pacific Railway Company, as fully appears upon the face of said plaintiff's complaint herein. That no facts sufficient to constitute

a cause of action against your petitioner's said co-defendants, M. L. Hare and John Presthus, or either of them, are stated or set forth in said complaint; and aside from that neither the said M. L. Hare, nor the said John Presthus had any right, power or authority to make any changes, alterations or openings in said embankment or any part thereof, all of which the said plaintiff and his attorneys then and there well knew, or by the slightest inquiry could and should have ascertained and known. That the said embankment, with the apertures and openings therein on the 7th day of June, 1929, as alleged in said plaintiff's complaint, was constructed by your petitioner in the year 1898, the same as it was on said 7th day of June, 1929, and neither the said defendant M. L. Hare, nor the said defendant John Presthus, was in any way, connected with, or had any hand or participation in, the construction of said embankment and the openings therein. That on the said 7th day of June, 1929, said defendant Hare was your petitioner's Division Road Master and the only authority which the said defendant Hare, as such Division Road Master, and the said defendant Presthus, as section foreman, had in the performance of their duties was to keep the road bed and the tracks upon said embankment, as then constructed, in repair and in condition for the safe operation of your petitioner's trains, engines and cars in the performance of its duties as a public carrier of passengers and freight; and neither the said defendant Hare

nor the said defendant Presthus, has any right, power or authority to make any changes, alterations, or openings in said embankment, or any part or portion thereof, all of which the plaintiff and his attorneys well knew, [10] or could and should have ascertained and known, as aforesaid, by the slightest inquiry.

6. And your petitioner avers that the joining of said M. L. Hare and John Presthus as defendants in said action is sham and fraudulent, and without any real intention of prosecuting the action as to them, or as to either of them, to judgment against them, or either of them, but as a device and scheme, and for the purpose and with the intention of preventing and precluding your petitioner from removing said cause to the District Court of the United States, for the District of Montana, and for the purpose and with the intention of depriving your petitioner of the right to remove the action to said United States District Court, and defeat the jurisdiction of said court in said cause.

7. That your petitioner herewith presents a good and sufficient bond, as provided and required by the statute, in such cases made and provided, that it will enter into the District Court of the United States, for the District of Montana, within thirty (30) days from the date of the filing of this petition for removal, a certified copy of the record of this action, and for the payment of all costs that may be awarded by the said District Court of the United States, if said District Court shall hold



that the said cause was wrongfully or improperly removed thereto.

WHEREFORE, your petitioner prays that this action be removed to the District Court of the United States, for the District of Montana, and that this Honorable Court accept this petition and the said bond and proceed no further in said cause, except to make an order for the removal of said action to the District Court of the United States, for the District of Montana, and to approve the bond herewith presented.

NORTHERN PACIFIC RAILWAY  
COMPANY,

By GUNN, RASCH & HALL

Division Counsel.

HILDEBRAND & WARREN

GUNN, RASCH & HALL

Attorneys for Petitioner. [11]

State of Montana,

County of Lewis and Clark.—ss.

E. M. HALL, being first duly sworn, deposes and says: That he is an officer of the defendant, Northern Pacific Railway Company, in the above-entitled cause, to-wit: one of its Division Counsel for the State of Montana, and makes this verification as such officer in said defendant's behalf; that he has read the foregoing petition and knows the contents thereof and that the matters and things therein set forth are true to the best of his knowledge, information and belief.

E. M. HALL.

Subscribed and sworn to before me this 21st day of February, 1931.

[Notarial Seal]

A. A. MAJOR,

Notary Public for the State of Montana.

Residing at Helena, Montana.

My commission expires February 28, 1931.

Due personal service of within Petition made and admitted and receipt of copy acknowledged this 25th day of February, 1931.

THOS C. COLTON

Attorney for Plaintiff. [12]

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[Title of Court and Cause.]

NOTICE OF INTENTION OF FILING  
PETITION FOR REMOVAL AND  
BOND ON REMOVAL.

To Nick Wagner, Plaintiff in Said Cause, and  
H. L. Maury and Thomas C. Colton, his  
Attorneys:

You, and each of you, are hereby notified that the Northern Pacific Railway Company, one of the defendants in the above-entitled cause, intends to and is about to file, on the 25th day of February, 1931, at 2 o'clock P. M., in the above-entitled court, and will present to the Judge of said Court, its petition that the said above-entitled cause be removed to the District Court of the United States, for the District of Montana, and also a good and sufficient bond on removal and will present said

bond to said Court for its acceptance and approval, in connection with said petition for removal, upon the presentation of said petition for removal to said Court. A copy of which said petition and of said bond on removal are herewith served upon you, together with this notice.

Dated this 21st day of February, A. D. 1931.

HILDEBRAND & WARREN  
GUNN, RASCH & HALL.

Attorneys for Defendant,  
Northern Pacific Railway Company.

Due personal service of within Notice and copy of Petition & Bond made and admitted and receipt of copy acknowledged this 25th day of Febry. 1931.

THOMAS C. COLTON,  
Attorney for Plaintiff. [13]

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[Title of Court and Cause.]

### ORDER OF REMOVAL.

The defendant, Northern Pacific Railway Company, having filed within the time provided by law, its petition for removal of this cause to the District Court of the United States, for the District of Montana, and having, at the same time, filed its bond in the sum of Three Hundred Dollars (\$300.00), with the National Surety Company, a good and sufficient surety, and conditioned according to law, and it being known that the notice



required by law of the filing of said petition and bond had, prior to the filing of said petition, been served upon the plaintiff herein, which notice the Court finds was sufficient and in accordance with the requirements of the law, said bond and petition are hereby accepted and approved, and IT IS ORDERED that this cause be removed to the District Court of the United States, for the District of Montana, pursuant to the statutes of the United States, upon the payment by the petitioner of the regular and customary fees therefor; and this Court will proceed no farther in said action unless said action shall be remanded to this Court by the said United States District Court, for the District of Montana.

Dated this 25th day of February, A. D. 1931.

FRANK P. LEIPER

Judge.

[Endorsed]: Transcript on Removal. Filed March 27, 1931. [14]

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Thereafter, on May 28, 1931, Motion to Remand with Affidavits attached was duly filed herein, in the words and figures following, to-wit. [15]

[Title of Court and Cause.]

MOTION TO REMAND TO STATE COURT.

Now comes the plaintiff and respectfully moves the Court to remand the above-entitled cause to the District Court of the Seventh Judicial District

of the State of Montana, in and for the County of Wibaux, for further proceedings upon the following grounds:

I.

The petition for removal does not state facts sufficient to constitute any ground for removal.

II.

The petition on its face shows that the cause was not removable.

III.

The complaint on file in the action removed shows that there is not a separable controversy between Northern Pacific Railway Company, a corporation, and John Presthus and M. L. Hare or a separable controversy between said Northern Pacific Railway Company, a corporation, and John Presthus or [16] M. L. Hare.

IV.

Since the filing of the record in the above-entitled court John Presthus, a citizen of Montana, of which State the plaintiff is also a citizen, has joined with Northern Pacific Railway Company in a joint general appearance making an issue of law and thereby the defendant, Northern Pacific Railway Company, in so joining with John Presthus has waived all claim that the action presents a separable controversy.

This motion is based upon the affidavit of Thomas C. Colton; the affidavit of Lowndes Maury; the affidavit of Nick Wagner, the plaintiff above named;

and, it is also based on the complaint filed in the State Court, a copy of which has been certified to and filed in the said Court of the United States.

THOMAS C. COLTON

H. L. MAURY

Attorneys for Plaintiff.

Service of the foregoing motion together with service of each of the three affidavits mentioned therein and of notice of said motion is hereby admitted this \_\_\_\_\_ day of \_\_\_\_\_, A. D. 1931.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attorneys for Defendants,  
Northern Pacific Railway  
Company and John Presthus.

[17]

[Title of Court and Cause.]

# AFFIDAVIT OF LOWNDES MAURY

State of Montana

County of Silver Bow—ss

LOWNDES MAURY, being first duly sworn on his oath, does say: that he is one of the attorneys for plaintiff in the above-entitled action at law and has been such since several days before this action was begun in the State Court; that plaintiff, in filing the complaint in the District Court of



the Seventh Judicial District of the State of Montana, in and for the County of Wibaux, acted entirely on the advice of co-counsel, Thomas C. Colton, and of affiant. That affiant knows more about why Presthus and Hare were joined as defendants than plaintiff or any officer of plaintiff; that the joining of M. L. Hare as a defendant was not and never has been sham or fraudulent, that there always, since its beginning and, for several days before its beginning, has been and now is a real intention of prosecuting the said action to final judgment against Hare. That the joining of John Presthus as a [18] defendant was not and never has been sham or fraudulent; that there always, since its beginning has been and now is a real intention of prosecuting the said action to final judgment against John Presthus; that affiant has practiced law continuously before the Courts of Montana and the United States Courts in Montana for more than twenty-five years last past; that where the convenience of witnesses and expense of procuring witnesses is equal between State and Federal Courts, affiant has usually sought originally the aid of the Federal Courts if such courts had concurrent jurisdiction of any particular action at law or suit in equity which affiant brought as attorney; for which choice of affiant the files of the Federal Court at Butte or Helena may be examined; that when making the preliminary examination of the merits of plaintiff's cause of action against defendants, Hare and Presthus, affiant was

informed that Hare as roadmaster ordered and stationed a train loaded with rock on to the embankment while the waters were rising on the embankment at Wibaux on the early morning of June 7, 1929, for the purpose of holding said embankment from being washed away, and thereby releasing the flood rising around plaintiff's property and affiant was informed that such act did retard the breaking of the embankment to plaintiff's damage; that affiant believed that such conduct of Hare created a personal liability on him for the resultant damage to plaintiff regardless of whether it was within the course of his service or not and affiant's first option as to such liability of Hare has been strengthened by reading the opinion of the Supreme Court (Court of Appeals) of West Virginia, in the case of Tayler vs. Chesapeake and Ohio Railroad, 7 A. L. R. 112, and in addition affiant was informed and believed that said Hare well knew, in ample time, to have reported to his superiors and repaired the condition before June 7, 1929, the insufficiency of the culverts and apertures set [19] forth in the complaint to carry off ordinary spring floods of Beaver Creek at Wibaux; that he knew that for many consecutive years in a radius of thirty-five miles from Wibaux, floods had recurred sufficient in size to break the Northern Pacific Railway roadbed and that such knowledge gave him good reason to believe that a flood the size of June 7, 1929, would occur at Wibaux and that he failed to report such knowledge to his superiors and failed himself,

as roadmaster, to remedy the condition; affiant had helped to establish the precedent in Montana that a superior agent is liable with his master for negligence whether it be an act of omission or commission—Hagerty vs Montana Ore Purchasing Co., 38 Mont. 69; that plaintiff is using reasonable diligence to procure service of summons on defendant, Hare, has for more than six weeks had in his employ one O'Neill a disinterested person above eighteen years of age, paid twenty (\$20.00) dollars to make service on Hare in this and other similar cases but so far plaintiff has been unsuccessful though said O'Neill has repeatedly called at Hare's residence in Glendive, Montana; plaintiff intends to continue his efforts to serve summons on Hare until it is done. This is not such a cause as under the laws of Montana summons can be served by publication.

That affiant was informed before this suit was begun that John Presthus, a track foreman for defendant railway on the section at Wibaux, had for fifteen years before June 7, 1929, intimate knowledge that the water had frequently risen on the railroad embankment at Wibaux in previous years; that he knew the condition was dangerous to plaintiff's property in times of annual flood that he failed to report the same to his superiors; that he failed to demand of his superiors that the condition be remedied before June 7, 1929, in time for his master to act; that he particularly was informed on June 6, 1929, of a flood in the [20]



watershed of Beaver Creek at Carlyle, twenty-five miles above Wibaux of enormous dimensions and that the same would arrive at Wibaux on the morning of June 7, 1929; that he did not report the oncoming flood to his superiors or ask permission to blast openings in the embankment; that for years before June 7, 1929, John Presthus had known of flood falling in a radius of thirty-five miles of Wibaux equal to the flood of June 7, 1929; that the track under his care had been repeatedly washed out by such floods within two miles of Wibaux; that with such knowledge he failed to notify his superiors of the dangerous approach of this particular flood and failed to guard against its damming on the embankment; that the rules of his master provided continuously for ten years before June 7, 1929, that for track foremen "defects in tracks, bridges, signals or any unusual conditions which affect the movements of trains must be promptly reported by wire to the proper authority" that as stated in the petition for removal Hare and Presthus both had authority to keep the roadbed on said embankment safe for the operation of trains; that the said roadbed on said embankment was not on June 6, 1929, or June 7, 1929, safe for the operation of trains to the knowledge of Presthus; that he knew before June 7, 1929, or had he used reasonable judgment, would have known that a flood would, unless additional vents were made in said embankment, back up on said embankment sufficient to wash portions away of both roadbed and

embankment; and as defendants allege that Presthus and Hare had authority to keep said roadbed safe for travel they had power to make larger openings in the embankment for the said natural water course in high water, because the only method of saving the roadbed would have also saved plaintiff from all loss; the flood which caused plaintiff's loss also carried away the roadbed in two places or more; that affiant has had experience [21] where an individual servant has been joined with a great solvent corporation and at the conclusion of the litigation the corporation was insolvent and the only payment of plaintiff's judgment were obtained from the individuals, and this against the same counsel now representing these defendants, to-wit: in the said case of Hagerty vs. Montana Ore Purchasing Company and Elliot Wilson, where had Wilson not been joined the fruitful judgment would have been entirely uncollectible; that in twenty or more cases commenced involving the same flood where damages respectively do not amount to three thousand (\$3000.00) dollars, affiant has caused plaintiff therein respectively to join Presthus and Hare as defendants and is prosecuting diligently against them in the State Court; that since procuring an order of removal from the State Court; and since filing the record in this court, as appears from the record, Northern Pacific Railway Company and John Presthus defendant, a citizen of the same state with plaintiff, have by the same counsel joined in and filed a joint general demurrer to plaintiff's

complaint, and thereby they have, and each of them has, waived and abandoned all claim and contention that this is a separable controversy as between said defendants.

LOWNDES MAURY

Subscribed and sworn to before me this 23d day of May, A. D. 1931.

[Notarial Seal]

MARGARET SHEA

Notary Public for the State of  
Montana. Residing at Butte,  
Montana.

My commission expires September 11, 1932. [22]

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[Title of Court and Cause.]

AFFIDAVIT.

State of Montana

County of Wibaux—ss

THOMAS C. COLTON, being first duly sworn on oath, does say: I am one of the attorneys for plaintiff above named; I have diligently studied the law pertaining to the above-entitled action and examined many witnesses and records as to the facts; I have believed from before this suit was commenced that there was a meritorious cause of action in favor of the plaintiff and against M. L. Hare and John Presthus, jointly, with Northern Pacific Railway Company. There has been from the beginning of the suit continuously and is now



a real intention of prosecuting the said action at law to final judgment against both M. L. Hare and John Presthus. That there has never been any fraudulent joinder nor any sham joinder of John Presthus to defeat the jurisdiction of the United States District Court; that there has never been any fraudulent or any sham joinder of M. L. Hare to defeat or avoid the juris- [23] diction of the United States Court; that affiant has, since this suit was commenced, believed always that the Federal Court under the law, as announced in Chicago, etc., *R. Co. vs. Tranbarger*, 238 U. S. 67, should and would, at the end of the evidence, grant a peremptory instruction to the jury to find for plaintiff and merely assess the damages.

THOMAS C. COLTON

Subscribed and sworn to before me this 25th day of May, A. D. 1931.

[Notarial Seal]

P. A. FISCHER

Notary Public for the State of  
Montana. Residing at  
Wibaux, Montana.

My commission expires August 10, 1932. [24]

[Title of Court and Cause.]

AFFIDAVIT.

State of Montana

County of Wibaux—ss

NICK WAGNER, being first duly sworn on his oath, does say: that he is the plaintiff above named; that before bringing this action he fully and fairly stated to his counsel, Thomas C. Colton, and H. Lowndes Maury, all the facts set out in the complaint so far as known to affiant, and also fairly stated what he expected could be proved about such facts by living witnesses that he was informed by such counsel that plaintiff had a meritorious cause of action against M. L. Hare and John Presthus and against Northern Pacific Railway Company; that he has from the beginning of the action and does still intend to diligently prosecute such cause of action against all three defendants to final judgment.

NICK WAGNER

Subscribed and sworn to before me this 25th day of May, 1931.

[Notarial Seal]

P. A. FISCHER

Notary Public for the State of  
Montana. Residing at  
Wibaux, Montana.

My commission expires August 10, 1932.

[Endorsed]: Filed May 28, 1931. [25]

Thereafter, on January 12, 1932, Order Denying Motion to Remand was duly entered herein, in the words and figures following, to wit:

In the District Court of the United States in and  
for the District of Montana.

No. 566 Nick Wagner vs. Northern Pacific Railway Co. et al.

The court having fully considered the within motion to remand to the state court, which was argued orally by counsel for the respective parties, also the several voluminous briefs, deposition and affidavits submitted, and now being duly advised, and good cause appearing therefor,

It is ordered that the said motion to remand be and the same is hereby denied.

Dated January 12, 1932.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Entered January 12, 1932. [26]

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Thereafter, on April 20, 1933, Answer was duly filed herein, in the words and figures following, to-wit: [27]

[Title of Court and Cause.]

ANSWER OF NORTHERN PACIFIC RAILWAY COMPANY and JOHN PRESTHUS.

Come now the defendants, Northern Pacific Railway Company and John Presthus, and for answer to the complaint on file in the above-entitled cause:



## I.

Admit that the defendant, Northern Pacific Railway Company, is a corporation, organized and existing under the laws of the State of Wisconsin, operating a railroad from Duluth, Minnesota to Tacoma, Washington, and thru the town of Wibaux, Montana; that said railroad crosses Beaver Creek in said town of Wibaux, at about right angles and in this connection alleges that said railroad has so crossed said Beaver Creek, and at the same location, since the year 1881; admit that Beaver Creek flows from the south to the north, but deny that said creek has a water shed of 720 or in excess of 342 square miles up stream from where said railroad crosses it in said town; admit that said stream has a length of about thirty-five (35) miles above said railroad crossing and that for most, if not all, this distance, it flows thru a prairie country without a heavy growth of trees along the banks of said stream, or its tributaries. [28]

## II.

Admit that said railroad crosses the valley of said Beaver Creek on an embankment and bridge and that the town of Wibaux is situated partly on the south and partly on the north side of said track and embankment and in this connection allege that said railroad had so crossed said valley on said embankment and bridge for more than forty-seven years prior to June 7, 1929; admit that said embankment is about 4000 feet long and about

15 feet high above the average low water level at the point where the bridge crosses the opening therein at Beaver Creek and that the height of the embankment decreases as it extends towards the sides of the valley on each side; admit that most of the town of Wibaux is situated within the Beaver Creek valley.

### III.

Deny that from June, 1928 to June 7, 1929, M. L. Hare was Master of the Road Bed and Ways of the defendant company at Wibaux, but admit that he was Division Road Master of said Company on the division embracing the portion of the track running thru the town of Wibaux, from April 22, 1929, until the present time, and that he is a citizen of Montana.

Admit that John Presthus, for more than ten years prior to June 7, 1929, was, and now is, section foreman on that portion of the railroad track crossing Beaver Creek Valley, and that he, during such time, has been a citizen of Montana.

Admit that plaintiff is a citizen of the State of Montana.

### IV.

Deny the allegations of paragraphs IV, V, VI, VII½ and VII of said complaint, and each and every allegation of said complaint not hereinbefore admitted or denied.

FOR A FURTHER ANSWER AND FIRST SEPARATE DEFENSE TO SAID COMPLAINT, DEFENDANTS ALLEGE:

I.

That the Northern Pacific Railroad Company, the predecessor in interest of the defendant Northern Pacific Railway Company, constructed a railroad track upon its right of way and grade or embankment over and across said Beaver Creek valley in the year 1881, at the point where the town of Wibaux is now situated, and that said railroad track has been operated and maintained on the same right of way without any change, except the raising of the grade a few feet, ever since 1881.

That said railroad track was constructed across said Beaver Creek valley upon the right of way as granted to said Northern Pacific Railroad Company and its successors, by Section 2 of an Act of Congress of July 2, 1864 (12 U. S. Statutes, page 365). That the defendant, Northern Pacific Railway Company acquired said right of way and said railroad in 1896, and has, even since, owned, operated and maintained the same, except for the period from December 28, 1917, until March 1, 1920, when said railroad was maintained, operated and controlled by the United States Government.

II.

That ever since 1881, the defendant company and its predecessor in interest, have been familiar with



the rainfall, drainage area, and the physical conditions of said Beaver Creek, and Beaver Creek valley south of said railroad track; that from 1881 to June 7, 1929, said railroad track crossed said Beaver Creek valley on said grade or embankment; that from 1881 to 1884 said railway track crossed said Beaver Creek channel on a pile trestle bridge connecting with said grade or embankment on each side of said creek channel; that in the year 1888 three pile bents of said trestle bridge standing in said creek channel were replaced by a 44 foot Howe truss bridge, thereby giving freer flow to the water in said creek channel; that in the year 1896 the track and said grade or embankment were raised 31½ feet, and said Howe truss bridge replaced with a permanent 70 foot plate girder bridge with the ends thereof resting on concrete abutments and with a 20 foot plate girder bridge over the approach to the main 70 foot span at each end thereof; that in the year 1898 [30] the track and grade were again raised 5 feet and said 70 foot plate girder bridge and said 20 foot plate girders at each end thereof also raised 5 feet; that said permanent bridge, as completed in 1898, connected the ends of said embankment on either side of Beaver Creek and left an opening beneath said bridge 100 feet wide and about 15 feet above average low water level and about 7½ feet above any high water line known at or prior to that time; that the opening under said bridge thereafter remained the same until June 7, 1929.

## III.

That said grade or embankment, bridge and opening were constructed pursuant to and in conformity with the judgment, experience and skill of highly qualified civil engineers employed for that purpose, and in pursuance to and in conformity with the natural drainage, water courses, and surface conditions of the land in the vicinity and south of the town of Wibaux along the valley of Beaver Creek and its tributaries, and the flow of the stream at any season of the year since the construction of said grade or embankment in the year 1881. That said opening in said grade or embankment at Beaver Creek was at all times sufficient in size to handle and capable of handling in a reasonable and proper manner, all flood waters in said Beaver Creek valley prior to said flood on June 7th, 1929.

## IV.

That in 1912, the defendant company, at the request of the Council of said town of Wibaux, constructed a viaduct or under-ground crossing thru said grade or embankment at a point about 500 feet west of said railway bridge over said Beaver Creek, which viaduct was about 35 feet wide at the bottom and 70 feet wide at the top, and about 15 feet high; that said viaduct was constructed for use as a street crossing from the south side to the north side of said grade or embankment; that said viaduct is so situated that it did also carry off flood waters of Beaver Creek during the high water of June, 1929. [31]

## V.

That several years prior to the year 1929, the exact date being to defendants unknown, said town of Wibaux constructed a fill or embankment across Beaver Creek valley at the point where the street, known as First Avenue South, in said town crosses said Beaver Creek, and a bridge was constructed connecting the ends of said embankment on either side of Beaver Creek, and leaving an opening beneath said bridge about 60 feet long and about 10 feet high from the low water level; that said embankment was used as a roadway for the extension of said First Avenue South, was about 10 feet high, and located parallel with and about 600 feet south of said railway embankment and bridge.

## VI.

That the damages, if any, sustained by the plaintiff on June 7, 1929, and referred to in his complaint herein, were the result of an unusual, excessive, extraordinary and unprecedented rainfall and flood in said Beaver Creek valley, such as could not have been reasonably foreseen or anticipated by the exercise of ordinary foresight and prudence in the building and maintenance of said railway grade or embankment, opening, bridge, viaduct, and structures of said defendant company, and was not due to any negligent construction of said embankment, bridge, viaduct, or to the existence of the same.



## VII.

That said excessive, extraordinary, and unprecedented flood, caused by said rain, as aforesaid, came down said Beaver Creek valley in a wall of water about six or seven feet high and extended clear across said valley for a distance of about 2200 feet at a point along the south side of said town of Wibaux; that said wall of water moving north reached the south side of said town at about 8 or 9 o'clock A. M. on June 7, 1929, and passed north thru and across said town and against said highway embankment at First Avenue South, and flooded the buildings and property in said town, including the property of the plaintiff herein, to a depth of six or seven feet before said wall of water [32] ever reached the grade or embankment, bridge or viaduct of the defendant company.

That by reason thereof the damage to plaintiff's property was due solely to said unusual, excessive, extraordinary and unprecedented flood, wall of water, and embankment at First Avenue South, as aforesaid, and not otherwise.

FOR A FURTHER ANSWER AND SECOND SEPARATE DEFENSE TO SAID COMPLAINT, DEFENDANTS ALLEGE:

## I.

That said railway grade or embankment and bridge across Beaver Creek was constructed long prior to the time the said plaintiff had any title to, possession of, or right of possession in, of, or to,

the land possessed or occupied by him at the time of said flood on June 7, 1929; that said grade or embankment and bridge across said Beaver Creek are on the main line of the defendant company, between Duluth, Minnesota, and Tacoma, Washington, and consist of a 4000 foot embankment, about fifteen feet high, with a heavy steel bridge with concrete abutments, and the same are and were designed to be permanent structures and of a permanent character; that at all times after the construction of said grade or embankment and bridge up to June 7, 1929, and for many years prior to the time that the said plaintiff had any title to, possession of, or right of possession in, of, or to said land, occupied or possessed by plaintiff at the time of said flood, said grade or embankment and bridge remained as they were constructed in 1898; that on June 7, 1929, the opening beneath said bridge was capable of carrying as much water thru said grade or embankment and bridge, as aforesaid, and at all times after their completion were used to handle the water flowing in said Beaver Creek and Beaver Creek valley; and defendants allege, upon information and belief, that at the completion of said embankment and bridge by the defendant company in 1898, and for a number of years thereafter, the land owned, possessed, or occupied by the plaintiff, or upon which his property was located, on [33] June 7, 1929, was owned by and in the possession of persons other than the plaintiff, and that all such rights as were acquired or possessed by the plaintiff to use or occupy said

land, or place his property thereon, were acquired by him after the construction of said permanent embankment, and bridge, as aforesaid.

## II.

That if said bridge, over the opening in said embankment, for twenty (20) years previous to June 7, 1929, except two dry years, had annually prevented the flood waters of said Beaver Creek from taking their natural course down the channel of said creek, as alleged by the plaintiff, then the plaintiff knew, or, in the exercise of reasonable care and prudence, should have known the same to be insufficient to take care of the flood waters that would probably come down said Beaver Creek valley, and the plaintiff acquired title, possession, or right of possession in and to said land, or the right to occupy the same, with knowledge of, and subject to, such permanent conditions, as they existed by reason of said embankment and bridge at the time he acquired his title, possession, or right of possession to, or to occupy said land, and he is thereby estopped and precluded from maintaining this action.

FOR A FURTHER ANSWER, AND THIRD SEPARATE DEFENSE TO SAID COMPLAINT, DEFENDANTS ALLEGE:

## I.

That plaintiff's cause of action is barred by the provisions of Subdivision 3 of Section 9031 Revised Codes of Montana of 1921, and also by the provisions of Subdivision 2 of Section 9033 of the



Revised Codes of Montana of 1921, and also is barred by the provisions of Section 9041 Revised Codes of Montana of 1921.

WHEREFORE, having fully answered, defendants pray that they may be dismissed hence, with their just costs.

JOHNSTON, COLEMAN & JAMESON  
GUNN, RASCH & HALL

Attorneys for Defendants, N. P. Ry.  
Co. and John Presthus. [34]

State of Montana

County of Lewis and Clark—ss.

E. M. HALL, being duly sworn, says: That he is an officer of the defendant, Northern Pacific Railway Company, to-wit: one of its Division Counsel for the State of Montana, and makes this verification as such officer for and on its behalf; and on behalf of the defendant, John Presthus, who is absent from this county; that he has read the foregoing answer and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

E. M. HALL

Subscribed and sworn to before me this 19 day of April, A. D. 1933.

[Notarial Seal]

A. A. MAJOR

Notary Public for the State of  
Montana. Residing at Helena,  
Montana.

My commission expires Feb. 28th, 1934.

[Endorsed]: Filed April 20, 1933. [35]

Thereafter, on May 2, 1933, Reply was duly filed herein, in the words and figures following, to-wit:  
[36]

[Title of Court and Cause.]

REPLY TO ANSWER OF NORTHERN  
PACIFIC RAILWAY COMPANY  
AND JOHN PRESTHUS

Now comes the plaintiff and replying to the answer on file herein, admits, alleges and denies as follows:

1.

Admits that Northern Pacific Railroad Company, the predecessor in interest of the defendant, Northern Pacific Railway Company constructed a road track upon its right of way and grade or embankment over and across Beaver Creek Valley in 1881, where the town of Wibaux is now situated. That said railroad track has been operated and maintained on the same right of way since 1881.

2.

Admits that said railroad track was constructed across Beaver Creek Valley upon the right of way granted to Northern Pacific Railroad Company and its successors by Section 2 of the Act of Congress of July 2nd, 1864. That defendant Railway Company acquired said right of way and said road in 1896 and has ever since owned, operated and maintained the same, except for the period from

December 28th, 1917, until March 1st, 1920, [37] when said railroad was maintained, controlled and operated by the United States Government.

3.

Admits that in 1912 the defendant railway company constructed a viaduct through said grade or embankment at a point about 500 feet west of said road bridge over said Beaver Creek Valley, which viaduct was about 35 feet wide at the bottom and 70 feet wide at the top and about 15 feet high. That said viaduct was constructed for use as a street crossing from the south side to the north side of said embankment. That it did carry off some flood water during the high water of June, 1929.

4.

Admits the allegations in paragraph five.

5.

Denies generally each and every allegation in the first separate defense contained, save such as are herein specifically admitted.

And for a reply to the second separate defense in said answer contained, the plaintiff:

1.

Admits that said grade and bridge across said Beaver Creek are on the main line of the railway company between Duluth, Minnesota, and Tacoma, Washington, and consist of a 4000 foot embankment



about 15 feet high. That there was a steel bridge with concrete abutments.

## 2.

Denies generally each and every allegation in the second separate defense contained save such as are herein specifically admitted.

## 3.

The plaintiff denies generally each and every allegation in the third separate defense contained to said complaint. [38]

WHEREFORE, having fully replied he prays for judgment in accordance with the prayer of his complaint.

THOMAS C. COLTON

LOWNDES MAURY

Attorneys for Plaintiff.

State of Montana

County of Silver Bow—ss.

LOWNDES MAURY BEING DULY SWORN says: That he is one of the attorneys for the plaintiff and makes this verification on behalf of the plaintiff for the reason that the plaintiff is absent from Silver Bow County, wherein affiant resides. That he has read the foregoing reply and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

LOWNDES MAURY

Subscribed and sworn to before me this 1st day of May, A. D., 1933.

[Notarial Seal]

A. G. SHONE

Notary Public for the State of  
Montana. Residing at Butte,  
Montana.

My commission expires February 14th, 1935.

Service of the above and foregoing reply admitted and copy received this———day of April, A. D., 1933.

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Attorneys for Defendant.

[Endorsed]: Filed May 2, 1933. [39]

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Thereafter, on April 5, 1934, Verdict of the Jury was duly rendered and entered herein, in the words and figures following, to-wit: [40]

[Title of Court and Cause.]

### VERDICT

We, the jury in the above entitled case, find our verdict in favor of Nick Wagner, and against the railway company, defendant, and we assess Wagner's damages at the sum of 5000.00 Five thousand Dollars.

JOSEPH G. PARKER

Foreman of the Jury

[Endorsed]: Filed April 5, 1934. [41]

Thereafter, on April 14, 1934, Judgment was duly entered herein, in the words and figures following, to-wit: [42]

In the District Court of the United States in and for the District of Montana.

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Assigned to Billings

No. 566

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NICK WAGNER,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,  
a corporation,

Defendant.

### JUDGMENT

BE IT REMEMBERED that this cause came regularly on for trial on March 26th, 1934, before the Court. The plaintiff was represented by Thomas C. Colton, Esq. and Lowndes Maury, Esq. The defendant was represented by Messrs. Gunn, Rasch & Hall, Johnston, Coleman and Jameson and Fred-eric D. McCarthy. A jury was duly impaneled and sworn to try the cause. Witnesses were sworn and testified on the part of the plaintiff and also on the part of the defendant. Counsel argue the cause and the Court charges the jury. The jury retire to consider of their verdict, and subsequently on April 5th, 1934, come into court and say:



(After Title of this Court and Cause)

“We, the jury, in the above entitled action find our verdict in favor of Nick Wagner and against the defendant railway company and we assess Wagner’s damages at the sum of Five Thousand (\$5,000.00) Dollars.

Joseph G. Parker

Foreman”

WHEREFORE, by reason of the law and the premises, IT IS ORDERED, ADJUDGED AND DECREED that Nick Wagner have and recover of and from Northern Pacific Railway Company, a corporation, Five Thousand (\$5,000.00) Dollars, together with interest thereon, and whereas, thereafter, on memorandum of costs duly filed and on motion duly made, the Clerk of the Court assessed the costs of the plaintiff at the sum of One Thousand Fifty-two & 53/100 Dollars.

IT IS ALSO ADJUDGED AND DECREED that plaintiff, Nick Wagner, recover of and from the defendant, Northern Pacific Railway Company, One Thousand Fifty-two and 53/100 Dollars, costs and both the principal sum of said judgment, Five Thousand (\$5,000.00) Dollars and the said [43] costs bear interest from the 5th day of April, A. D. 1934, at the rate of six per cent per annum until paid.

Dated April 14, 1934.

C. R. GARLOW

Clerk.

By C. G. Kegel, Deputy.

Attest the Seal of the Court:

[Court Seal] [44]

Thereafter, on Aug. 2, 1934, Defendant's Bill of Exceptions was duly signed, settled, allowed and filed herein, being in the words and figures following, to-wit: [45]

[Title of Court and Cause.]

#### DEFENDANT'S BILL OF EXCEPTIONS.

BE IT REMEMBERED: That the above entitled cause came on regularly for trial at Billings, Montana, on the 26th day of March, 1934, before the Honorable Charles N. Pray, Judge of the above entitled Court, sitting with a jury; H. Lowndes Maury, Esquire, of Butte, Montana, and Thomas C. Colton, Esquire, of Wibaux, Montana, appearing as counsel for the plaintiff, and Frederic D. McCarthy, Esquire, of St. Paul, Minnesota; E. M. Hall, Esquire, of Messrs. Gunn, Rasch & Hall, Helena, Montana, and W. J. Jameson, Esquire, of Messrs. Johnston, Coleman & Jameson, Billings, Montana, appearing as counsel for the defendant, and the following proceedings were had:

The COURT: Are you ready for trial?

Mr. HALL: May it please the Court, I would like to move the admission of Mr. Frederic D. McCarthy of St. Paul, for the purpose of this trial.

Mr. MAURY: I would like to join in the motion.

The COURT: Very well. Mr. McCarthy may be admitted for the purposes of this trial. [54]

Mr. MAURY: There are two other defendants than the Railway, and five or six months ago, I gave notice that the case would be dismissed as to

those two other defendants. The plaintiff's case is dismissed as to John Presthus and M. L. Hare, and stands only against the Northern Pacific Railway Company.

The COURT: Very well. Let the record so show. If you are both ready, gentlemen, we will call a jury. (Jury drawn, examined and sworn to try the case.)

(Opening statement on behalf of the plaintiff, by Mr. Maury); (Opening statement on behalf of the defendant, by Mr. McCarthy).

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ALBERT PICKERING,

being first duly sworn as a witness on behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Albert Pickering; have lived in Wibaux since 1892. I have been in the store business, elevator business and poolhall business. I have worked on the section for the Northern Pacific Railway Company—the section west of Wibaux and running to Wibaux. We had a lot of rain in the spring of 1897 and 1898, and it washed out the track from about one mile the east side of Beaver Hill to Hodges; that is west. Part of that storm also took place in Wibaux. Some of the track was washed out between three and a half and four miles from Wibaux.



(Testimony of Albert Pickering.)

I recall the bridge that stood there from about 1896 until June 7, 1929. When that bridge was first built there, as to the condition of the ground between the pier and the abutment on the east side of the bridge and the pier and the abutment on the west side,—you could drive through on either side of the pier; we drove right on the bed of the stream. That condition remained— [55] well, I drove through there for four or five years, at different times, and under each side,—on each side of the pier. At that time that I am speaking of now, there was no viaduct here, nor any little viaduct for the children up here. A change took place under the east opening and the west opening there; it was filled up. Plaintiff's exhibit 4 is a correct representation of the change that took place under that bridge. This change was that it was filled up between the pier and the bank, on each side. That condition which is shown in that photograph remained there about twenty years,—until June 7, 1929.

Mr. MAURY: We offer in evidence plaintiff's exhibit 4. These pictures have exhibit numbers on them, your Honor; I think that would be better.

The COURT: Very likely.

Mr. McCARTHY: No objection.

The COURT: It may be received in evidence.

Mr. MAURY: I call to your attention (speaking to jury) the condition between the east pier and east abutment and between the west pier and

(Testimony of Albert Pickering.)

west abutment. You may pass it with that explanation.

My attention having been called to plaintiff's exhibit 1, I have seen that scene in Wibaux, I would say around about 1907 or 1908. I have seen it more than once—the condition of the creek—as portrayed in that picture.

Mr. MAURY: We offer in evidence exhibit 1.

Mr. McCARTHY: No objection.

The COURT: Exhibit 1 is received in evidence.

My attention having been called to exhibit 5, that is a correct portrayal of a scene that I have seen in Wibaux. That was taken before 1910 or 1911, taken before that time.

Mr. MAURY: We offer it in evidence.

Mr. McCARTHY: No objection. [56]

The COURT: It may be received.

Mr. MAURY: I call attention to the riprapping on each side of the creek and near the bridge.

Plaintiff's exhibit 25 portrays correctly scenes that I have seen once or more at Wibaux. I have seen a scene such as this, a number of times—I mean ice at the places where it appears to be,—in the years 1905, 1898, 1907 and 1921. Of course there was no ice then; I seen high water. Backwater from the railroad embankment caused those blocks of ice to remain there. I can see the embankment here (pointing to the model) that I speak of; this here, is the embankment. I see in exhibit 25 a house that was once the county court-

(Testimony of Albert Pickering.)

house; that was burned down before 1921,—I don't know just what year; I don't remember. No such house has existed in Wibaux, as this with the tower and cupola on top of it there, since 1921.

Mr. MAURY: We offer in evidence this picture, exh. 25.

Mr. McCARTHY: No objection.

The COURT: It may be admitted in evidence.

I said I was in the elevator business,—in the years 1910 and 1911. The elevators are right across from the Occident, this way. This (indicating) is the Occident. The ones you are pointing to now are the Farmers'. When I worked there, there was no Occident there. I worked in the J. C. Kinney elevator; it was on the east side of the track, and it is now on the other side—it was moved across. In the spring of 1911 I was working there and in that high-water, it backed up over the track and filled up the grain pit,—I mean this passing, or side-track, here between the elevators. It backed from the railroad embankment. Just the year 1911, I seen, that that water backed from the railroad embankment and into those elevators. I seen it back up over the track several times, and from the embankment. It filled up the grain pit and ruined what wheat we had in the pit. [57]

Describing some of the floods that happened there before 1921, and how they acted,—well, I seen high-water in 1905, 1911, and different times while I



(Testimony of Albert Pickering.)

lived there. I seen water come around the town two or three different times, from the west.

Q. What caused it to come around the town?

Mr. McCARTHY: Objected to as calling for a conclusion of the witness.

The COURT: Sustain the objection.

Q. Mr. Pickering, where would the water start backing up at that went around the town?

A. It came around by Orgain Avenue. Orgain Avenue, on the plat, is right here (indicating); so marked on the plat. As to where it would come from,—it came around this way. When it came around to the point which you are pointing to now,—the bridge,—and around to Orgain Avenue, Wibaux would be sitting on an island,—water all around the town. Comparing the elevations of the water to the north of the railroad track, that is, downstream,—with that water that was to the south, upstream, will say that the water would be higher on the upstream side. Before 1921, I have, five or six different times, seen the water higher on the upstream side of the embankment than on the downstream-side. As near as I can tell, that was in the years 1898, 1905, 1911 and 1921.

I was there in 1921. I noted a flood that took place in June. Describing that to the court and jury: it happened about 2:00 in the afternoon. We had a big rain in the south and southeast; she rained about an hour and water came down and made an island out of the town; came down both sides and went underneath the viaduct. By the “viaduct” I

(Testimony of Albert Pickering.)

mean this little road-bridge here. In 1921, the water was about three feet deep underneath the viaduct. As to how much of the town was above the water at that time—that did not get wet—it was all but this; do you want me to point to it? The water came down this street here and down [58] this street.

Q. You are pointing first, to First Street and second, to Second Avenue South?

A. Second Avenue and Orgain Avenue, and it came down the street.

I was not in the Davis Addition at all during that flood. I didn't look across and see what was there. This is the Davis Addition over here, and to the east of the creek.

On the morning of June 7, 1929, I woke up at 20 after 4:00; people were talking in the hall, about the creek being up, and I looked out the window. That is where I was (pointing out the building); that is the Chappell Hotel. I looked out to the south,—southeast; looked at the county bridge. When I looked out, there was some tourists trying to cross that and they had to back up. Between the elevator and the bridge was all flooded in there. That was about 20 minutes after 4:00—between 20 minutes after and 4:30. As to how wide an expanse of water I could see there at that time: I seen from the county bridge to the elevators here. I went back to bed again, stayed in bed, and I got up then 10 after 6:00. I looked out at that time; I went down to where I had my car; my car was on Orgain Avenue. I saw the creek coming up there and I

(Testimony of Albert Pickering.)

thought I better get my car out; it was sitting pretty close to Beaver Creek. To get to my car I come down Wibaux Street and turned east on Orgain Avenue. When I went down there, Wibaux Street was dry and Orgain Avenue was dry. I got my car,—I had another man get it. There was six inches of water in the garage and he asked me if he could help me get my car. I said “Yes”. My car was right there in the garage—this little building here (indicating). I didn’t drive the car away; he asked me where I wanted it, and I told him: “Put it up on Orgain Avenue on the corner,”—the place where I am now,—this place here, the corner of Orgain Avenue and Wibaux Street. Before water came into Wibaux Street at this point here, where I set my [59] car, it was about 10 minutes to 7:00. First, it come from the east and west.

Q. And which part of Wibaux Street was covered with water first, down towards Orgain Avenue or up towards the plaintiff’s place of business—Nick Wagner’s?

A. It come down from Nick’s first; it came down from the south.

Q. How long was Wibaux Street so you could walk along through it, after 10 minutes to 7:00? I mean at the point here, between Orgain Avenue and First Avenue South,—how long did it remain so you could walk through it there?



(Testimony of Albert Pickering.)

A. Well, I put my car up there—I first put my car up on the street; then I went and called my wife and told her we might have to get out of town; I told her the creek was coming up, and I walked down to the Chappell Building and looked around half an hour, and I come back up on the street where my car was, and the water was coming down Orgain Avenue both ways, from east and west. I seen we couldn't get out and I set my brakes—on the corner—and the water started coming down Main Street from the south and I says, "We better get back to the hotel," and we waded in water six to eight inches deep and back to the hotel, and we went to the roof of the Chappell Hotel; we could see it all for about two or three miles up the creek and down the creek. It was a gradual raise. In the Chappell Building the height of the water was about—the building I am in now, that was about the same height,—it was 52 or 53 inches. I noticed from the Chappell Building, from where I was up on the building, that there was plenty of stuff floating around. I saw the county bridge. Finally, the water got up to the bottom of it and lifted it off and floated it down the stream, in back of the depot. The east end lifted up first,—that is the end towards the elevator. It landed right in here (indicating), pretty close to where my garage was. \* That garage is located right on the end of Orgain Avenue. [60]

Mr. McCARTHY: That would be Orgain Avenue as projected to the east and just inside of the

(Testimony of Albert Pickering.)

railway right-of-way line—railroad property line.

Mr. MAURY: Is that it—that little house?

A. Yes.

Mr. McCARTHY: Just outside of the railroad property then,—the black line indicating railroad property.

It moved slow. As close as I can remember, it must have been between 8:00 and 9:00 o'clock that that county bridge lifted up. I recall where the Methodist parsonage was the day before; it was on Second Avenue; it is right on the corner there. That went away twenty minutes after the bridge went out, or fifteen,—I don't remember exactly. I noticed that before it started moving. I seen it floating out in the stream; it floated out in mid-stream.

Q. How far would you say it went east before it turned?

A. It floated right out in here (indicating),—to about a crack in the model,—right straight out. Then it came on down and landed near the depot here, about twenty-five feet from the depot. I think I would recognize a picture of it after it lit. Plaintiff's exhibit 9 is a correct representation of the Methodist parsonage after it came to rest near the depot.

Mr. MAURY: We offer it is in evidence.

Mr. McCARTHY: No objection.

The COURT: It may be received.

(Testimony of Albert Pickering.)

I could see other objects floating around from my point of view; I seen about everything coming down the street.

Q. You saw some come down the street. About what time did they come down Wibaux Street? What were some of the objects you saw coming through?

A. Piece of a barn,—I couldn't tell what they was,—lumber and stuff.

As to when the embankment broke, I should judge it was about, pretty close to 10:00 o'clock in the morning; it kept crumbling.

Q. Could you see from where you stood or not, any difference in [61] the elevation of the water below the fill and above it? Or could you see?—On the other side of the track?

A. I could see the water going underneath there, yes. I could see it going underneath the viaduct.

Q. What, if you could observe was the difference in elevation between the water north of the track and south of the track?

A. Like a waterfall.

Mr. McCARTHY: Objected to, if the Court please. That is an approximation there.

The COURT: That is all you intended? Approximately?

Mr. MAURY: That is all I intended.

Q. You may go ahead. What was, as far as you observed, the difference in elevation?



(Testimony of Albert Pickering.)

A. It looked to me like between four and five feet difference, that was from my point of view. The north side was the lowest. As it went through the viaduct, it looked like a waterfall. The course that objects took that came to it,—it looked like going over a waterfall; I am speaking now before the embankment gave way. I didn't observe any animals going through the viaduct; there was a cow swimming around, but she didn't go through the viaduct that I seen. That cow was swimming around the building known as the Orgain Building on Orgain Avenue and Main Street. That is this building right here (indicating),—swimming around in here on the back of it and side of it. She was swimming around there until the water went down and she got up on top of the sidewalk. I think it was Fred Zapfi's cow—I am not sure; I don't know where his stable was; she was around there for half an hour I imagine. I saw a horse swimming around. That horse was on Orgain Avenue (indicating), right about in here.

Mr. MAURY: Your Honor, by putting in rebuttal testimony, we don't want to be foreclosed from putting in other rebuttal testimony—

The COURT: Well if you have no objection—

[62]

I did not see anything at that time in the way of a wall of water. I did not hear anything of that kind,—any rumble. When the embankment went out, the water went down, and then she raised

(Testimony of Albert Pickering.)

about six inches afterwards, or an hour afterwards. Between any first and second rise, so far as I could see, there was about six inches difference.

Cross Examination:

(By Mr. McCarthy).

My attention having been called to the relief map that we have here before us,—at the edge of the map furthest away from the jury, there is a white mark standing upright, I recognize that as the statue of Pierre Wibaux. Immediately back of the Pierre Wibaux monument, there are some crosses right there near the clerk's desk. That indicates the cemetery; the cemetery is on a pretty high hill. The Pierre Wibaux statue is on ground that is a little higher (not considerably higher) than the town of Wibaux is on. If water poured on the Wibaux monument, part of it would run towards the town and part wouldn't. It is on a hill,—a little hill. The high ground extends on towards the cemetery, getting higher as you get towards the cemetery. South of town, directly east of the Massey place,—the part that you are pointing to there,—that is also high ground,—higher than the balance of Wibaux. And to the east of the center of the Davis Addition,—say that if we projected Olive Street directly east of the intersection of Regina Street and Olive Street,—there is high ground. There is a valley there,—in fact, there is high ground all around Wibaux.

(Testimony of Albert Pickering.)

Q. Wibaux is right in the bottom of a valley—the town of Wibaux—isn't that right?

A. Part of it is in the valley and part of it is up on the higher bank. So, if we had a rainstorm in 1921 and it rained out near the cemetery and the Pierre Wibaux monument, I would expect that water to come down into the town; it would come down there. [63]

Q. And if you had a rain that is on the east side of the town over here, in the District immediately east of Mr. Massey's place on down, on the easterly edge of the town, and east of the Davis Addition, the water, you would expect, on that high ground there, would drain off into the Davis Addition?

A. Drain off into Beaver Creek.

Q. It would drain into the Davis Addition before it would get into Beaver Creek?

A. Well, it would come around.

Q. Well, suppose it rained all along here,—I am pointing now from the southerly edge of the map, the high ground at the southeast corner, to the railroad embankment on the north,—to the north,—and the east extremity of the railroad as shown on the map, it rained all along this high ground there on the edge, or what is shown here on the relief map as the edge of the map, why the high water would all terminate down into the Davis Addition?



(Testimony of Albert Pickering.)

A. Some would and some wouldn't. If it rained over on this slope here, that wouldn't go in the Davis Addition.

Q. Oh, I see. If it rained over here on this little section, it wouldn't but the great part would all drain down into Possum Hollow and some to the Davis Addition?

A. Some of it would go into the slough there and some into the Davis Addition and some into Beaver Creek,—from this section here.

The railroad property is outlined here in black. I see the black line on the model just to one side of Esther Street and then running to the creek, then running on down across the map, and then on the other side of the railroad embankment, another black line. I understand that indicates the railroad property. The elevators are on railroad property. The railroad property is lower than other parts of town; it is a low place down here near the elevators between the railroad embankment and the elevators,—well, some of it is on the same level as the town and some isn't. The space from the elevators,—this is a piece of low land in here. [64]

Q. What space will you put it? Everything to the north of First Avenue and west of the easterly elevator and then east of the creek,—this section all in here?

A. This is low land in here. This here is on about the same level as Wibaux is on. In here is a baseball diamond; it is up on a bench here.

(Testimony of Albert Pickering.)

Q. But the low land to the west of the slough and north of First Avenue and south of the railroad track and east of the creek, is all low land, isn't it? It is a low place?

A. It is a low place in here (indicating).

Q. I am taking in everything west of the slough and north of First Avenue east of the creek, and south of the railroad embankment,—this low section outlined here by the slough, First Avenue and the creek, that is all low?

A. I showed with the stick where the low land was,—using the slough as the edge; then up to First Avenue, then up on the north side of the Avenue,—it is low over there too—low on both sides of First Avenue,—all low in there.

Q. If you will examine the map carefully, you will see that it is low. So, if you had rain draining off the sidehills and down through Possum Hollow and coming down through the culverts of the side-track running to the elevators, you would expect it would collect there, wouldn't you Mr. Pickering?

A. It would collect in the low place, yes. But it ain't on the same level as the elevator.

This county bridge that went out in 1929 was a steel bridge, wooden floor. I can't give you any idea about how many tons that bridge would weigh. I wouldn't say it did weigh in excess of 20 ton; I wouldn't want to guess at it; I don't know how much it weighed.

My attention having been called to plaintiff's exhibit 1,—the picture,—and to a mark about half

(Testimony of Albert Pickering.)

way between the man standing here and the telegraph pole, I see a pencil mark "X" on there. That mark indicates the cement wall at the Wibaux house; the "X" [65] indicates the cement wall at the Pierre Wibaux home,—or the stone wall; I think it was built of stone.

In addition to the county bridge going out and the parsonage going out in 1929, I saw lumber going down the street; I didn't see no barn,—parts of a barn or something like that, I saw.

The railroad embankment didn't go out at once; it crumbled away or gave way gradually.

The county bridge, composed of steel with the exception of the wooden flooring, didn't at any time back up away from the railroad embankment after it started to move. It moved towards the railroad embankment, not the bridge; it moved northwest towards the railway embankment; it moved north and it moved west. But at no time after it started to move did it move to the south.

Q. From the time you first saw the Methodist parsonage going out, it moved first to the east and then to the north, is that correct?

A. And it moved northwest. At no time did the Methodist parsonage move to the south.

When I stood up on that Chappell Building, I looked to the south, and all up Beaver Creek valley there was an enormous expanse of water,—there was a lot of water; and it was wide; the high-water was over a great width. That was true as far up the



(Testimony of Albert Pickering.)

valley as I could see—a couple miles that I could see. When I stood on the Chappell Building, I seen objects moving in that water down the main street there; they moved down Main, or Wibaux, Street; moved on down in a northerly direction,—well, a lot of it went west; a lot of stuff went down Orgain Avenue, shingles and stuff like that.

Q. Before getting as far north as Orgain Avenue, when you saw objects moving down Wibaux Street to the south of Orgain Avenue, the objects were moving in a northerly direction?

A. I seen shingles coming out of that lumber yard there, coming straight west,—I can show you—— [66]

Q. Well, put it this way: Did you see objects moving on Wibaux Street before they reached Orgain Avenue, that were moving north?

A. Well, they had to move north coming down the street; they had no place else. I didn't see those objects moving south; I saw them moving west, but I didn't see any moving south—saw them moving west—coming out of the lumber yard going west.

After the railroad embankment had gone out, the water went down first, then came up again—come up about six inches; there was a six-inch rise in the water after the railroad embankment had gone out; after the water went down, come up about six inches in about an hour.

Q. Now, Mr. Pickering, when you have in mind

(Testimony of Albert Pickering.)

Wibaux Street or Main Street, as it leaves your pool room and goes north under that viaduct and over to the community church, if the rear end of your building—if we took the center of Wibaux Street at about even with the rear of your building, that point in Wibaux Street would be considerably higher than Wibaux Street opposite the Congregational Church, wouldn't it, Mr. Pickering?

A. I don't think there is much difference between the——

Q. Stop and think of it! Isn't there quite a pitch down here, so that this point down here near the Congregational Church, is it not quite a little lower?

Mr. MAURY: May I suggest that we have exact measurements on these elevations; and that this is improper cross-examination.

Mr. McCARTHY: I want to show that the ground slopes there.

The COURT: You will have to do that by some other witness. He says he doesn't think there is very much difference.

It was about noon—12:00 o'clock, the day of the flood, that I came down off of the roof of the Chappell Building. I imagine it would be about two hours after the railroad embankment went out [67] before I came down.

(Testimony of Albert Pickering.)

Redirect Examination:

(By Mr. Maury).

These objects that went from the lumber yard here towards the west were bundles of shingles. They floated west up near the Catholic Church. Right there (indicating) is the Catholic Church; they floated right below it. Of course, during all this time, there was some water going through the bridge and some through the viaduct.

Q. And there was a general slow movement due to that debouchment of the water that was in the lake?

Mr. HALL: Object to that as leading.

The COURT: Yes.

After the water went down, I seen that the north end of William Manning's building was stove in. A great big stump was inside of that building. The front wall, facing the track, was stove in. I don't know how big a hole there was compared with the stump that was on the inside; I just see that big stump in there.

Q. How did the hole correspond with the stump?

A. Well, it kind of caved the front of the building in,—the lumber part of it.

Q. Is it possible that the stump could have come from any other side?

A. I don't think; no.

Mr. McCARTHY: Objected to as calling for a conclusion.



(Testimony of Albert Pickering.)

The COURT: He can give the result of his observation,—whether it would be possible, in his judgment, from his observation,—not saying all of the details surrounding it.

Q. Could it be possible?

A. No, sir; there was buildings all around the back part of it, and sides of it.

Q. Did any appreciable water, as far as you could see, come from up towards the Pierre Wibaux monument?

A. No; not as I noticed now. I am speaking about June 7, 1929; no appreciable water come from that. There was no water falling in Wibaux when I got up [68] that morning at 4:20. I went to bed at 12:00 o'clock and it was raining then in Wibaux.

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JEAN WEBBER,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Jean Webber. I was working in the telephone office the night of June 6th and morning of June 7th, 1929. It is in the same block east of Nick Wagner's place. In the evening of June 6th I went on shift about 6:30 I think. I worked there on shift until I left the next morning about 7:00 o'clock. As to what called my attention to water rising in that neighborhood,—it was about 6:00

(Testimony of Jean Webber.)

o'clock in the morning and I was awakened by the ringing of the switchboard. We have a little apartment back of the office. So I got up and dressed and put up the shades to the south and also to the north in our rooms. I could look out then and see the water. I looked out south first and I saw water just in the creek. Then I walked back to the north and saw water flowing from the north towards the telephone office. "From the north", I would describe that also as from towards the railroad fill. As it came from towards the north, towards our building—it came towards our building and ran down some basement steps back of our building. Those basement steps are right back of Nick Wagner's place. When the water was running down the steps of Nick Wagner's place, the condition on the south side of our building there on First Avenue South was dry; there was no water on the bank. I didn't leave the office until about 7:00 o'clock and before there was any water on the street in front of the building south, there was water to the depth of a hub of a car which sat back of our place just a few feet away. I remember Mike Heckaman taking his car, but I wasn't paying attention; I was there notifying [69] people; I was just answering rings as they came. What caused me to leave the telephone building was the water coming over the road to the south of the telephone office. I saw it come up over the edge, then I wakened my mother. She was in the apartment, which is a room

(Testimony of Jean Webber.)

right back of the telephone office; it is in the same building.

There wasn't any depth to it as it first came over the street there; it just seeped over the edge and then gradually came across and over the sidewalk and into the door, and it was about the depth of my waist when I left. I didn't observe anything in the nature of a wall of water coming in there. I could see out by Nick Wagner's place from the windows of our place and I could see some of the street in front of the Crescent Hardware here,—a little. I first observed water in that section after I had seen it in the back; it was quite a while after I had seen it in the back—not so very long before I left the building. As close as I can remember, about an hour elapsed after the water came into the back door of the telephone building before it commenced to come over the street in front. I went, after I vacated with the water waist-deep, on top of that block in which the Wagner store is located,—this block here (indicating). I remained there until in the afternoon, somewhere around there. The water rose  $5\frac{1}{2}$  feet in our place; I don't know how high it was in Wagner's store, but it was that high at least.

When I got on top, I could observe all this country to the south as far as Massey's. I just saw water there and houses as they—the surface of the water was level. I saw no wall of water that morning. I saw the county bridge go out. The east end of the bridge sort of raised up first, then floated—swung



(Testimony of Jean Webber.)

over and came northwest. I think it was at least 20 minutes after that that the Methodist parsonage went out. When the Methodist parsonage left its foundation, I could still see the eaves of it,—the [70] roof and the eaves, and it went directly east until it floated down past Mr. Dahl's blacksmith shop. (You are now pointing to Mr. Dahl's blacksmith shop).

Mr. McCARTHY: Dahl's blacksmith shop is just east of the intersection of Second Avenue South and Wibaux Street, is that right?

A. Yes, sir.

It went on the south side of Dahl's blacksmith shop,—floated down this way (indicating). It was going east but south—well, it was going straight east, south of Dahl's blacksmith shop. When it passed where the county bridge had been, it was moving steadily,—not rapidly, but steadily. Comparing it with the way one walks, I would say it was going a little faster than you were walking. I don't drive a car. I think it was going four or five miles an hour. I didn't see that building lift up and go from around the water tower. I could observe the railroad bridge from where I was. I could observe when the embankment commenced to crumble near the railroad bridge. As to the time of day with reference to other events,—it was after we had been up on that block some time; I would say it was around 10:00 o'clock in the morning. As it crumbled it went slowly. The height of the water on it when it crumbled, with reference to the ties on

(Testimony of Jean Webber.)

the bridge, it was quite well towards the top; I don't know just what the distance was. All the time, of course, some water was running through the bridge. I could not observe the viaduct from where I was. The water going under the bridge, from my point of view, looked like—I couldn't see on the other side—but it looked like it might have been sloping through, but I couldn't see north of the bridge; I couldn't look through there; I didn't. I couldn't observe the water up near the tower; from my point of view, that was not observable; nor a house that was standing right here (indicating).

Cross Examination:

(By Mr. McCarthy). [71]

The Methodist parsonage moved east and then north—slightly northwest. I at no time, saw that Methodist parsonage after it started to float away or move away, move to the south. As to how deep the water got on the parsonage, I could see the roof at all times; you might say about all I could see was the roof and the eaves—from the eaves up, the parsonage was exposed to view and from the eaves down, it was under water. It was moving along slowly, steadily, about four to five miles an hour, as well as I can judge. It possibly may have been going a little faster and possibly may have been going a little slower, but it never stopped; and it never moved to the south; it moved to the northwest and landed close to the depot against the railroad embankment. This steel bridge, with the wooden floor-

(Testimony of Jean Webber.)

ing, when I saw that go out, it moved northwest and not to the south; it moved north and west, but at no time moved to the south.

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MRS. FRANK O'KEEFE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

(By Mr. Maury).

My name is Mrs. Frank O'Keefe. I have lived in Wibaux since June, 1910. In those early days I was a school girl. The part of the town I lived in first was the Davis Addition, over to the east of the stream. I went to school at the Wibaux County highschool; that was over here (indicating). I would get to school from my place in certain seasons or the springtime, by going around over the railroad track; it would be by coming around the hill and over the railroad track. I would come up over the railroad track on account of the high-water. The high water would be over the county road that leads towards the elevator and the one that leads towards the Addition. You are pointing to it—that is the county road that I mean. I have done that quite a few times [72] in the spring, that I would come over the railroad track to get to school, because of high water there. I went to school about



(Testimony of Mrs. Frank O'Keefe.)

eight years, and it wouldn't be every spring that I did that, but it would be numerous. That was before June, 1929.

In 1929, the water was higher on the south side of the railroad fill than on the north or downstream side. I hadn't observed that before or paid any attention to it,—I hadn't paid any attention to it. I don't know how far upstream in the spring, this water that I found right here on the county road would extend,—all along the creek I guess.

I got up at 6:00 o'clock on June 7, 1929. I was over in the Davis Addition. I was staying in this house here (witness indicating a house close to the southeast corner of Beaver and Olive Streets). Was called at 6:00 o'clock, by Mrs. Blair of Wibaux. She called me and told me the creek was coming up; that we should get up. At that time, the creek wasn't up to our place yet; the water wasn't at our place in the Davis Addition. I had a view over to town, I mean across the creek into the main part of town. I couldn't see the Mattie Miller House from our place, but I could see over in the direction toward the town there was plenty of water—or lots of water. I could see the plaintiff, Nick Wagner's property from where I was,—the top of the building. I saw objects floating in that water. I saw a barrel and it was floating from the north to the south; saw it coming down the street and I watched it until it got to our place. It was in the Davis Addition when I noticed it—probably a block from our place up the

(Testimony of Mrs. Frank O'Keefe.)

street towards the railroad—that I first observed that that barrel was coming from north to south. I watched it until it came down to our place; I should judge it was a city block. The barrel lit right along our fence; it was bobbing along there. I don't remember of seeing it after the flood subsided. I could see the Methodist parsonage go; I didn't see it until—I saw it going towards the railroad [73] embankment; that was the first time I observed it. I didn't see a house move up near the water tower; that was out of my vision.

I was not in the same house in 1921; was in the same Addition. There was more water in the Davis Addition in the 1921 flood than in 1929. As to how much deeper it was,—well, it was over a foot at the house where I now live in 1921, and it didn't reach that height in 1929. In 1929, the water didn't get into the house where I now live at all.

Q. In 1921, what was the immediate direction from which the water came?

A. Well, it rained mostly all afternoon, and hard,—in town. I don't know how high the creek rose in 1921; it didn't come up into the town very much in 1921. As to how much deeper it was in the Davis Addition in 1921 than it was in 1929,—I don't know how deep it would be; it was probably six inches deeper at the place where I am at now,—at least that, in 1921.

Q. Do you recall any incidents of people being rescued in the Davis Addition, in 1921?

(Testimony of Mrs. Frank O'Keefe.)

A. Yes, sir.

Q. Who were some of those people and where were the houses? Point them out.

A. My sister was taken from the house where I live now, in 1921.

Mr. McCARTHY: I object to this line of testimony as incompetent, irrelevant and immaterial to any issue in this case. It appears now from the exhibit in evidence, that the water, in 1921, that got in the Davis addition would necessarily come from the sidehills and the draws. The witness has told us that the water didn't get up in the town from the creek; therefore, it would have no question on the adequacy of the railroad bridge or not; it has nothing to do with the case.

Mr. MAURY: The range or the locality is the test. In that locality, it may be gone into to show notice,—35 miles in any direction— [74]

Mr. McCARTHY: The witness says the water of 1921 didn't get up in 1921 and do any damage. It is possible that it got up in the Davis Addition. What bearing could it have on the—

The COURT: You gentlemen ought to know. You have been through this enough. It may have some bearing on it, and I will overrule the objection. Let it be shown briefly. I don't think we need to go into all the houses.

Mr. McCARTHY: Exception.

(Question repeated):

A. Well, from the house that I live in now, my sister was taken—



(Testimony of Mrs. Frank O'Keefe.)

Mr. McCARTHY: Pardon me. May it be understood, in order to save time, that my objection, and ruling and exception, may apply to all of them?

The COURT: Yes; go ahead.

A. And different houses in the Davis Addition,—in the Yuell house; I believe it was this one here, (indicating the house about midway between Lincoln Avenue and Grant Street, and facing Bushman Street); and this one; and there was someone taken from this house here, and from that one; these two other houses were that square one there (indicating the house on the corner of the block, Regina Street is on the east of it, southwest building in the block); and this one is in the northwest corner of the same block.

With reference to pointing out high-water marks of the 1921 flood to Mr. R. A. Lyman, I showed him the high-water marks of the Yuell house—it is the farthest house in that block; and also at my own place. I didn't show him any others. I showed him truly and correctly what those high-water marks were.

On the morning of June 7th, the people were moving to the south; I went to the first house south when I left our place; and the direction that other people were moving was to the south. The [75] reason they were going to the south was because the water was coming from the north and as it backed up, we backed up too. That morning, some of the people went up on the hill directly south. My people and I went south and we crossed what is known

(Testimony of Mrs. Frank O'Keefe.)

as Possum Hollow and came up on the hill where I used to live.

Cross Examination:

(By Mr. McCarthy).

I mean that in 1929, the people got up on the high hills to the south of the Davis Addition. Some of the high land is to the south of the Davis Addition. It was not right away that some of the people went there for refuge, but we just kept going south all the time.

When I went to school, the foot-bridge that leads to the county bridge had not been built. When I went as a school girl over here to the high school,—I lived here in the Davis Addition—and I had to get over to this high school, and at that time, there was no foot-bridge along here parallel to Beaver Street, or on Beaver Street. The foot-bridge is across low land, and when it rained, water got down in that low place and it got muddy; it extended across both the roads. And there being no bridge, there was no other way to go, but around by the railroad bridge to get through. As to whether it was to keep our feet dry and clean, and whether there was a suggestion that it was so deep that we could not get through, will say that we couldn't have waded; sometimes we went by team and wagon; a team and wagon could get through without any trouble. The water wouldn't get up in the wagon box; there wouldn't be any such depth as that.

I didn't see the county bridge got out in 1929. I saw the Methodist parsonage, but only after it was

(Testimony of Mrs. Frank O'Keefe.)

moving to the north or northwest; I couldn't see from my place, when it left the foundation. As to the depth of the water: somebody said the parsonage was going, and I could see just the top of it,—I could see all of [76] the roof, but I couldn't see below the eaves. The house moved all the time I was watching it in a north or northwesterly direction. I haven't any knowledge as to how fast it was going; I could just see it moving. At no time that I looked at it was it moving to the south.

Redirect Examination:

(By Mr. Maury).

I didn't see anything that resembled any wall of water there that morning.

I knew a Miss Edith Jones. I don't recall seeing her there that day at all. I knew her well at that time by sight. I had known her ever since I came to Wibaux, about.

Q. I mean June 7, 1929?

A. Yes, sir. I don't recall seeing her that day. I was back and forth among people that were watching that stream that day. There was more than a dozen people there, as far as I recall, watching the stream rise.

Q. Among them, you did not see at all Miss Edith Jones?

A. No, sir.

Mr. HALL: We object to that as repetition.

I was there that day, June 7, 1929, watching that stream, until about 11:00 o'clock. The water went



(Testimony of Mrs. Frank O'Keefe.)

down during the morning, then it started to rise again. It didn't rise again very much, but it was noticeable; we didn't have any marks, but we just noticed it. As to about what time one could walk in the streets of Wibaux, will say that I went up to the railroad embankment in the afternoon and watched them take Mrs. Lochray from the tree,—in the boat; but I didn't go down town. I didn't notice people walking down town or moving in automobiles. That was in the afternoon, but I didn't know what time it was.

Recross Examination:

(By Mr. McCarthy).

I spoke of rescuing Mrs. Lochray from a tree. That tree was in here somewhere, north of the railway embankment. [77]

Mr. McCARTHY: The witness indicating a point north of the railway embankment and north——

A. I don't know whether it was on this side of the creek or this one, but we stood over here. I wouldn't say where the tree would be with reference to the black line indicating the railway property, but it was in here some place; it may have been south of the railway right-of-way line and it may have been north. But it was somewhere in the vicinity of the railway property-line, possibly a little north and possibly a little south, and I am not positive now whether it was east or west of the creek.

(Testimony of Mrs. Frank O'Keefe.)

Q. But the water had been so high north of the railroad embankment that Mrs. Lochray had taken refuge in the tree?

A. Her house is in the low land; I don't know what time she went there, but I watched them get her out.

(By Mr. Maury).

They got her out after the railway embankment broke; I should judge it was 5:00 o'clock.

(By Mr. McCarthy).

The house I lived in in 1921 they didn't put a foundation in it after that; it is just as it was then. The house I am living in now wasn't raised after 1921. The Yuell house wasn't the one I lived in in 1921; in 1921 I lived here—this one (indicating a house east of Regina Street).

(By Mr. Maury).

Q. This is the house you lived in in 1921? (pointing).

A. Yes, sir.

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ED. SHERMAN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Ed. Sherman. I lived in Wibaux on June 7, 1929. I got up that morning about 5:00 o'clock. My place of [78] business was the Crescent Hardware on Wibaux Street, to the south across the street from Nick Wagner's place. When I got up,

(Testimony of Ed. Sherman.)

the water had got up to our building and I dressed at 5:00 and come downstairs and went down to the basement to close the window, or a trap door we have in the basement, and I got that closed and came back upstairs to pull up a pipe that we use for the overflow of a cistern. I pulled that up and then I went in to have a bite of breakfast and before I was through, they said the water was coming up in the store. When I finished my breakfast, or when they called me, I went down thinking I might save something in the basement and Warren got down in the basement when the water came around the front and into the cellarway that comes in from the north of the store. It was a metal door that I closed. They were put there to keep—when the water came up, it always broke the window we had there, and we put that down there when the water came up, so the rubbish and stuff couldn't go down in there. That would occur in the spring of the year.

I was there in the flood of 1921. Shortly after the flood of 1921—I couldn't tell when—those were put in our basement. In 1921 I boarded up the window, and I thought I had it high enough so the water wouldn't run over it. It lacked one or two boards more and I thought it was high enough, but it was not, and it run into the basement. Since 1929, the water has never come into our basement.

On the morning of June 7th, after I ate breakfast, I came downstairs. As to the depth of the water in front of my place or Nick Wagner's,—



(Testimony of Ed. Sherman.)

when I came down it was just filling in. I came to the front door as I came out of the basement, and the water met me at the front door. Wagner's was right across the street; I didn't notice how deep it was towards Wagner's at that place.

I walked across the street from my place—south-west from the store—to what is known as the Davis house, or Elliott is living [79] there. I couldn't tell the real depth of the water in front of the Elliott house when I got there; because I didn't measure it. On me it was probably up to the knees, I don't know; I was there quite a little while waiting for Mrs. Elliott to come out of the house so I could take her to safety. When the water got up to their porch, I told her she would have to come, because I couldn't stay there longer, because it was gradually getting deeper, and I figured I couldn't get her out if she waited much longer; so I carried her out.

Q. Where was her house now, that you carried her from? Take the ruler. Now, where is Mrs. Elliott's place?

A. This is the Crescent Hardware (indicating south of First Avenue South and east of Wibaux Street). I was over on the other side. This is our place here. Then, it is right over there.

Mr. HALL: That is the little X-shaped house in the center of the block. \*\* It is an X-shaped building on the west side of Wibaux Street and about the middle of the block, between First Ave. South and Second Ave. South.

(Testimony of Ed. Sherman.)

I took Mrs. Elliott up to the corner in front of the—it was the Drake store. That is diagonally across from Nick Wagner's. I didn't leave her there; I waited a little while for Mr. Hanson to come with the truck and then I carried her so she could get on the truck, and he took her up the street to what is known as the Chappell Hotel, and he came back and I crossed the street to the Crescent Hardware again and our women-folks were there and we started out to take them out from there. We started out to carry them, but the water had gotten so deep then, so that we figured we wouldn't be able to carry them; so we had to walk. The depth of the water then on Main Street was just above the knees. I didn't see anything that looked like any wall of water coming through there that morning; there was no such a thing.

I went up on top of the Chappell Building. I had a vision of [80] the viaduct and a building beyond the viaduct, from the Chappell Building. You are pointing now to the Community House.

Q. You had kind of a social interest in that, being a trustee?

Mr. HALL: Locate that building; it hasn't been located.

Mr. MAURY: All right; that building is north of the railway track; it is the first building north of Nolan Avenue and to the west of Wibaux or Main Street.

There is a church between that building and the corner; they look like they are built together as one. There is kind of a porch—you might call it a porch—

(Testimony of Ed. Sherman.)

on the east end of that building which is called the Community House. From the Chappell Building to that, I could observe the action of the water on that building. I observed a door swinging open in the wind. I don't know how long it swung open, but when the water was the highest on the south of the viaduct, that door was still swinging open. After the viaduct had washed out, then the water raised so that it struck the door and swung to the north then. The door stayed there until the water went down and I presume then it swung out again. I don't know how long it stayed with the water pressing it against—because I was looking other directions. I say “when the viaduct went out”—the ground near the viaduct—the fill on each side. I don't know how much of the fill washed out on each side; there was quite a little of it.

Q. How long after the water got to its crest and at its highest, did that door continue to swing in the wind, as near as you can tell us?

A. Well, until the embankment went out and then, of course, the water raised and then it got up to the door and then swung open.

#### Cross Examination:

(By Mr. McCarthy).

My place of business is located on Wibaux or Main Street; it is directly south of First Avenue South—the building you are [81] pointing to—and it is directly west one block, of the county bridge. There is a low place at the rear of our store; the



(Testimony of Ed. Sherman.)

ground is lower at the rear of our store than it is on Wibaux Street. I never had any water bother the windows on Wibaux Street in 1921 or any other time; it just got to the back on the south there in 1921. The back is right directly up there—low—directly up from the creek. On the back of our building we had a window,—on the east side of the building—east end,—the east end towards the creek. It used to come up there and break the window and so I put a metal cover over it.

On June 7, 1929, when I got up on top of the Chappell Building and looked to the south, I could see up the valley.

Q. There were places you could see where the water was over half a mile wide?

A. I didn't pay much attention to that; I was looking around through the town. I wasn't interested in whether more water was coming; I was paying attention to stuff on Wibaux and saving stuff—the stock, and——

Q. Water on Wibaux—depending on how much came from the south?

A. Well, no,—after yes,—I wasn't paying much attention to the south country. I presume that there was water more than half a mile wide up the valley.

When I got up to that place to rescue Mrs. Elliott, there was water on Wibaux or Main Street, and it was flowing north on Wibaux Street; and when I got Mrs. Elliott and started back across the street, there was water flowing on Wibaux Street, and that water was flowing north.

O. S. DRAKE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is O. S. Drake. I came to Mingusville in 1892. [82] Wibaux used to be called Mingusville, and was when I came there. I have followed the livery business quite a long time. I first was just a drayman. I worked for Walter Osterhouse the first year or two that I was in Wibaux.

I recall a flood or rise of water that took place in Wibaux in June of 1921—13 years ago. Approximately, the southern part of the town was covered by that flood, and a loop around by the railroad track towards the Orgain property. That is the Orgain house that you are pointing to, and that is on Orgain Avenue and the first house to the east of D Street. The damage that flood did to the railroad embankment to the east of the bridge, there was a considerable washout on the east embankment close to the east pier, which was afterwards—they hauled rock and dirt and filled in, because it was washed out so much that the railroad was unsafe, I should judge. I never was there to measure that, but I know there was considerable new work put in there soon after the flood of 1921; they riprapped it quite a lot higher than it was before at that time.

Q. Do you recall further up the track about 3,000 or 4,000 feet to the east, what happened in 1921?

(Testimony of O. S. Drake.)

Mr. McCARTHY: Objected to as incompetent, irrelevant and immaterial,—outside of the drainage area of Beaver Creek—and not material to any issue in this case.

The COURT: That might be in the drainage area. I don't think the question is definite enough so we can determine. Is it within the drainage area?

Mr. MAURY: I don't know the exact distance of the drainage area——

Mr. McCARTHY: May I ask a question or two?

Mr. MAURY: But whether it was or not, we purport to show the strength of that storm all the way to Medora 35 miles, to show the power of storms that might be expected [83] by the railroad company in that locality, under the decision of the Supreme Court.

The COURT: I think I will overrule the objection.

Mr. McCARTHY: Exception.

Q. What, if anything, happened to the railway track about 3,000 feet to the east of the depot?

Mr. McCARTHY: In order to save time, may we have the same objection, and the ruling, and exception? \*

The COURT: Yes.

A. Well, off a little further east than the stock-yards loading chutes, there was quite a little water went in there and this embankment was washed or



(Testimony of O. S. Drake.)

softened so that there was an engine overturned in there while it was pulling out of town. By the "stockyards", I intend to convey the idea of this thing on the map here, which you are pointing to, and near the intersection of the switch with the main line; it was east of the stockyards, I wouldn't say how far; I never measured it.

Q. Do you recall if the thing I show you is a picture of what happened at that point in 1921 on the Northern Pacific line?

A. Yes, sir.

Q. Is that a correct photograph of it?

A. It is a photograph of the engine as it laid there for several days.

Mr. MAURY: We offer it in evidence.

Mr. McCARTHY: Objected to as incompetent, irrelevant and immaterial, not bearing on any issue in this case, and outside of the drainage of Beaver Creek, so far as Beaver Creek south of the railway track is concerned.

The COURT: Overrule the objection.

Mr. McCARTHY: Exception.

On the morning of June 7, 1929, I got up about 4:30 I should judge. My place of business then was on the main street of [84] Wibaux in what is known there as the Stipek Building. That is the place there; you are pointing to it. It is directly west of the Crescent Hardware Company and katty-cornered across the street from Nick Wagner's

(Testimony of O. S. Drake.)

place. I was following the general mercantile business there.

At that time we lived over in what is known as the Davis Addition. I slept there the night of the 6th—in my home. On that night, in Wibaux, it wasn't raining when I went home—possibly 9:00 or 9:30; then in the night, we had a heavy rain, I don't know just what time. There was no rain when I got up that morning of the 7th; it was raining in the night. I don't believe any rain fell that day until 4:00 o'clock. Going from my home to my place of business that morning, we took the street going directly north to the county bridge. I crossed the county bridge. When I crossed the county bridge, the banks was full; it was a good high river; it was a good raise then. What I call the "banks", the main stream that the bridge spans; what I call the "bench" is the main stream that the bridge spans. Then there was water above that bank, out on the flat. When I crossed the bridge, the water was up on that flat back of the Crescent Hardware store there—the basement. When I got to my place of business, the first thing I done was to try to get the neighbors up at the Crescent Hardware; I tried to get my neighbors up around, because I see we was having a big raise, and the Crescent Hardware was right across from my store. In 1921,—they have got an east basement window——

Mr. McCARTHY: That is objected to——

(Testimony of O. S. Drake.)

The COURT: That was all gone into by the other witness.

I went into my place of business and started to take my merchandise out of the cellar and straightened around; also, I sent for my son. He worked in the store with me and I sent some boys down there to call him, so as to have him come up. [85]

Q. Did you wake up anybody else?

A. Well, unless I did the Crescent Hardware "boys"; that was about the first thing I done—was to try to call them, which I did. They didn't have any 'phone upstairs. I worked in my store about one hour I should judge. The water finally caved in the south wall, fell in—and the water came in from the west and from the south into my place; that is what drove me out of my cellar. When I went up from the cellar, the water was on the south around my place, and up near to the front of the store. The street runs north, and it is quite a little higher as it advances to that street north of my store. But no water was between me and the Crescent Hardware. There was no water north to the viaduct, only in this low place west, running to the Orgain Building. When I came out, it was all backed in and as high as it was in 1921, but not running in through the street between the Crescent Hardware and down towards the railroad, towards the depot. After that, the water kept gradually rising. So, I had a lot of tobacco and dry sugar and stuff on the floor, and I tried to set my garden



(Testimony of O. S. Drake.)

seeds up on my counters, off the floor. The water raised very fast, but not in no bunches. The first thing I knew it was running onto my floor. Then I set this other stuff up—all the dry stuff I could onto my counters, and I should judge it was 6:00 or 6:30 when it was coming into the door about eight inches. It took eight inches in this store to begin to run through to the viaduct down Main Street. At that time, the water was higher towards Main Street than it was there,—towards Main Street, the part of Main Street that is directly north from the Stipek Building—from where my store was towards the depot, past the Orgain Block and the bank and the Sawyer store. The Sawyer store is on the next corner next to mine. That is the highest part of town—the highest part of that street in town. After that—well, at my place, it was near knee-deep, and I started to go to the depot; started to go north [86] to the viaduct, thinking I could get up on the railroad track and possibly go home. I had no definite plan which I could do now; I had no plan made. As to how far I got down Main Street,—well, I got nearly one-third of the way across from the corner of the brick building, where I see the viaduct was full; it was higher down there than where I was, so I stopped and there was a cream station—By the viaduct I mean this little bridge here under the railroad; I was going from my place of business here, towards there, to get out. As to where I stopped in

(Testimony of O. S. Drake.)

my course, and why: Right directly across from the Wagner store is what is called the Sawyer store now; it was built by the Woodburn Brothers. That is on the northwest corner of First Avenue South and Wibaux or Main Street; and the next building joining that is the butcher shop, and the next building joining that at that time, was a cream station. That building I speak of as a cream station is now gone—vacant; and there was a stairway on the north side of this cream station,—outside stairway,—so I stepped in there to get my breath and rest. The height of the water on me when I went in there was possibly 18 inches,—knee-deep,—but I stepped in on the step, so I could see down the street both ways. As to who joined me there: well, our neighbor, J. D. Cullen, came across from the viaduct there—his lumber office. He has been Mayor of Wibaux. The lumber yard where he was coming across from, is the thing you are pointing to south of the depot,—on the right-of-way. Joe Cullen was trying to come across from that corner. When I first saw him, I should judge the water was around waist-deep on him. He had in his hand what I call a four-horse neckyoke, off a four-horse drill,—to hitch four horses up. He was using it as a cane, a prop, to steady himself as he advanced across. The water when I first saw him, was pulling him back towards the Orgain residence up towards the viaduct,—up towards this residence that you are indicating; and from this corner the water seemed

(Testimony of O. S. Drake.)

to have a pull [87] on him there and it looked like he wasn't going to come across to my side of the street. What happened to him: well, there seemed to be a few feet there as if he was released, and he came on over and he came to where I was and we both went up these stairs, and the house was vacant above. On the back is a back-door, Yale lock there, and there is a platform there on the level with this butcher shop,—eaves of that,—and we went up there and stayed up on there through the storm—through the flood. After that, the water raised rapidly. Probably, when we got up there, it was 7:30 or 8:00 o'clock, and it just kept on gradually raising—steadily raising, until I should judge, about 9:00 o'clock, then it hesitated; and really we thought it was going down. We had no marks. The Building joining us there was a weather-boarded building,—frame building. We could judge on the window of that by counting these boards, how much it raised, when we were looking somewhere else,—sometimes on the front of this butcher shop. There was this Sawyer building; I couldn't see south and I couldn't see to the back end—anything on the south and west of me. When I came back, I would count these boards; possibly we were gone fifteen or twenty minutes, and it would be four or five inches higher or something like that. There was talk between me and Mr. Cullen,—we had no way of measuring it. As we saw it, we thought there was a second rise of water.



(Testimony of O. S. Drake.)

I should judge 9:00 o'clock it checked and we thought, if anything, it lowered itself, and the next time we came back, it was four inches, or a lap of weatherboard higher than it ever had been before. Then we didn't know whether it dropped or not. It kept on raising until about 10:00 o'clock. When the water commenced to recede, it went down lots faster than it came up this big raise. It started going down about 10:00 o'clock when the railroad embankment gave way. And the bridge was in such a place behind the Chappell Building, that I couldn't see the bridge; I couldn't see the depot either, but I [88] could see the eastern edge of the viaduct. From where I was standing, the first I noticed of the break-up, I should judge 40 or 50 feet of it gave way at one break-down; and there was a sidewalk—a stairs that went over this embankment, and the breaking of the sidewalk and the cracking of timber was loud enough in all that, that we could hear it above the flood—the storm—or above the noise of the water that morning. It was quite windy that morning. That wind was south of me; it came from the south and east; it was pretty hard to get warm; we could get up—it was a square front—and we could look. The wind blowed quite hard—enough to make quite a lot of waves; the expanse of the water, it would cause quite waves. If you had been on lakes where I have been, it would make good heavy waves on the surface of the water; it made the water rough;

(Testimony of O. S. Drake.)

there was a heavy wind; it was a steady wind. As to the length of time that elapsed after this breaking away that I saw to the east of the viaduct from where I was here, before I went down on the street and could walk around,—well, it was after noon quite a little; I wouldn't be sure whether it was 12:30 or 12:00 o'clock or 12:30, or something like that, when my son come by so he could walk on the sidewalks. There was five or six inches of water and mud possibly, down there, and he went down and opened the store and got us a lunch of sardines and crackers on the shelves up above the water. The height of the water mark in my place of business after I went back to it on that day—the highest point of the water was 5 feet seven inches—nearly 6 feet. I pointed out to Mr. Lyman high-water marks at my place, as of June 7, 1929. I pointed out to Mr. Lyman other high-water marks at different parts of the town,—at what I call the green house; that don't mean it is a greenhouse. That is the green house you are pointing to. And then different places,—the store building, I showed him the marks there—at the Stipek Building, where my store was at that time; and then on the north part of the town [89] different places I showed him the water marks where the water was. I pointed them out truthfully and accurately; they were very plain at that time and there would be no guessing; they was plain to be seen and fresh. At the present time, I could show



(Testimony of O. S. Drake.)

you water marks, but it wouldn't be so positive. It was quite a while there was water marks on that store building—the highest point it was—and that is the first time I saw water on that corner. With reference to 1921, I showed Mr. Lyman some of those high-water marks on the north side. While on the south side, the old green house, I could show him approximately where it was, there is no marks of that—but I could show him on the windows of the basement, but not quite as good as where the marks was there.

I was running a livery stable in 1921, directly across from the Methodist parsonage, right this side of the green house on that vacant place in there. My livery stable is immediately north of the green house and directly south of Charlie Dahl's blacksmith shop—just a street between us. My livery stable was facing on Main Street. In 1921, the water got possibly, in the office, 30 inches—2½ feet, and in the main part of the barn, being two steps down, it was possibly 3½ foot. In 1921, that was directly after dinner when the raise came and it was down out of the barn by evening, so I really don't recall how long it did stay at the high stage. It generally takes three days for those floods to run down to normal after a flood. The stream would be quite long and it takes that long for a flood. But the main flood was off of that flat by evening, or before night. That flood of 1921 stood at the crest possibly 3 hours or 4 hours,—1½ to 3 hours. I had



(Testimony of O. S. Drake.)

so much work to do that I wouldn't be sure how many hours, but it was down out of the barn before evening, so we could bed our horses and put our stock back in the barn. In 1921, I didn't notice objects floating around—not so very much.

In 1929, I was in a place I couldn't get away, and I could [90] see quite a lot of stuff floating. Some of it would come up to Wibaux Street and go east, and some come out of the same warehouse and go west and lodge in back by Orgain's house; and others would come in and lodge by the depot, and others would go through the viaduct. When I say "came up Wibaux Street", I call it from the south going north—I call that going north, because I am higher at the First National Bank at that corner, than I am down at the old green house, or where my barn used to be, so I always called it "up".

Q. What have you to say as you looked around over the water there on June 7, 1929, if it conveyed to you a level or rough surface, except for these wind-waves?

A. It was,—only where the wind would strike it, we would call it rough water; where the wind hits on the water, it was kind of rough water. From the Wibaux Machine & Auto Company, barrels, tires, old sheds, lumber,—and it didn't have no place to go. Lots went down to the bridge—all that could get through—and this other went through the viaduct, lots of it,—but lots of it didn't have no steady current because it was dammed up and

(Testimony of O. S. Drake.)

it wouldn't take it away all at the same time. I didn't mention that it took water a certain length of time to get out of my livery stable—not out of the livery stable—but out of the main channel that come up back of Charlie Dahl's shop, and back of my livery stable was filled in with manure from time to time as we filled up, but the water came up to that level; but we never had it in the livery stable only that two times; when I was there, only the one time onto the barn-floor proper.

Cross Examination:

(By Mr. McCarthy).

When I speak of the green house, I refer to the house sometimes called the Mattie Miller house; it was where Mattie Miller was living at that time. That is the house a short distance north of the intersection of Beaver Creek and Wibaux or Main Street, [91] and directly to the east of Wibaux Street, and it is south of Second Avenue South. You are pointing to the Dahl blacksmith shop; it is across on the north side of that street going in front of the Methodist church; it is east of Main or Wibaux Street, right on the corner; it is on that corner at least—the Charlie Dahl shop. The blacksmith shop to which I am referring is a very short distance—almost in line with Second Avenue South, if Second Avenue South was projected,—it is projected—slightly to the north of Second Avenue.

(Testimony of O. S. Drake.)

Q. Now, your livery barn, in 1921, was somewhere in between the Miller house and the Dahl blacksmith shop?

A. It was on the other corner straight from the Methodist church—directly east of the church, right across the street,—facing the north; it was east of Wibaux Street, right directly south of Charlie Dahl's blacksmith shop, right opposite the church there. The livery barn faced on Wibaux or Main Street, and the part of the livery barn that was on Wibaux Street, the ground at Wibaux Street where the livery barn opened onto Main Street, or Wibaux Street, was higher than the ground where the rear of the livery barn was located, and in this low ground here, in 1921,—some water got in this low place.

Q. Did any water get up on Wibaux Street in front of your livery barn in 1921?

A. There was bare ground in front of the livery stable in 1921 all the time.

Q. There was no water in front of your livery barn?

A. In front of the barn there was quite—it was lower.

Q. The livery barn was a little below the street level?

A. The front of the barn was quite a little lower than up on the church-side. Down in front of the barn was level also, then kind of a slope. I had a dirt floor—just gravel and scoria at the main part of the barn.



(Testimony of O. S. Drake.)

Q. There was no water running down Wibaux Street in 1921?

A. The [92] water came down in 1921 up to the Crescent Hardware.

Q. But there was no stream flowing down Main or Wibaux Street?

A. There was a lot of water in front of Charlie Dahl's blacksmith shop.

Q. Yes; in the low land east of Wibaux Street. But was any flowing down Wibaux Street?

A. Plenty of water.

The COURT: Answer the question.

A. The water flowed down as far as the Crescent Hardware.

Q. Did it flow up in front——

A. Yes, sir; in front of the barn, but not in front of the church. I don't believe that Wibaux Street at the intersection of First Avenue South is higher than Wibaux Street where it goes under the viaduct.

I said that I came to Wibaux in 1892. I worked as a cowboy there for Pierre Wibaux,—one summer for Mr. Wibaux. I worked on the range all over that country where Wibaux is now,—north of the track and south of the track. I went a considerable distance south of the railway embankment—clear to Ekalaka, I suppose; that would be quite a ways south of tributaries of—forty miles south, and probably forty or fifty more. So, I was familiar with the country for a great many years.

(Testimony of O. S. Drake.)

I ran this store about five years, I should judge, before the 1929 flood. When I went over to my store the morning of the flood, there wasn't any water on Wibaux Street when I got to the store. I would say it was about 7:00 o'clock when water was on Wibaux Street in front of my store,—that was quite high. The first water I saw around my store was on the west end and south side; that is the first water I saw in the vicinity of my store—it was on the west and south side of my store. The railroad embankment is north of my store, and the first water I saw was on the south side and on the west side; and that was around 7:00 o'clock when I saw water there. I started, of course, as I said, [93] to get my stock out of the basement and get it on the floor, and later, I became alarmed and abandoned my store. When I went out of my store I walked north on Wibaux Street; I was on the west side of the street. When I left the store, it was between 7:00 or 7:30—about half past 7:00, and at that time, there was water on Wibaux Street and over the sidewalk. I had to walk in water when I went north on Wibaux Street. At that time, at the store, it was about 18 inches deep, and as I was going down the street towards the railroad, it was shallower, because there was higher land there, but it soon raised to about 18 inches there. This water I was walking in on Wibaux Street was apparently flowing north. I got up on top of the building there next to the

(Testimony of O. S. Drake.)

butcher shop—we got up on the cream station—what we called it at that time; it is tore down and burned and tore down. We got from that—started up onto the butcher shop, where the butcher shop is now. From where I was I could not see the valley to the south, on account of the brick building and Sawyer's store. This water that I saw the heavy waves on was right on Main Street, as we looked towards the green house and towards the Davis Addition. They were rolling kind of from the southwest katty-cornered, coming from the southeast, and coming towards me—towards the northwest; from the southeast and rolling to the northwest.

Q. You didn't see any waves rolling from the north to the south, did you?

A. Not unless it was up close to the Orgain building on that corner, but there seemed to be a wash there of different directions; I didn't see any waves rolling from the north to the south.

When I was up on top of this building, the water raised rapidly until 9:00 o'clock. Then, it was kind of a question there whether it seemed to go down,—we don't know whether it did; it seemed to stand still for a while. At any rate, the raising of the water stopped. That is what I thought at that time, that [94] that water was going down; and then the water after a few minutes, started up again, and it continued to rise and it got quite a lot higher than it had at 9:00 o'clock.



(Testimony of O. S. Drake.)

In response to counsel's question, I spoke of articles coming up—articles moving in the water—floating or being carried in the water. By “coming up”, I mean they were coming from the south and going north—coming towards me and going down the stream.

Of my stock, I had in the basement of my store possibly 150 cases of canned goods,—possibly that,—I wouldn't be right sure. I don't think that I carried any of that up the stairs before I had to leave my place of business; I carried it over to the stairs and stacked it there. The water came too fast for me to get my stock of goods to the first floor; I might have got a few cases, but I don't think I did.

Q. Of course, if you had expected a flood, you wouldn't have had a stock in the basement?

Mr. MAURY: A man has the right to occupy his property any way that they wish and they presume that a railway company will not be guilty of negligence. We want to state our position in the matter. \* \* \*

The COURT: Go ahead.

Mr. MAURY: Our exception.

Q. If you had anticipated a flood, you wouldn't have carried your stock down in the basement?

A. I could explain that.

Q. Answer the question.

A. I expected the water to come up around the building. It looked like it would come as high

(Testimony of O. S. Drake.)

as in 1921. I “guess” the basement was completely filled with water; it got up above the basement—got up 5 feet above the first floor. If I had anticipated 5 feet of water, I wouldn’t have been in the store; I would have moved a long time ago. [95]

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CHARLES E. WHITE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Charles E. White. My occupation is that of newspaper owner and publisher in Wibaux, for the last 20 years. My place of business is in the same building with Nick Wagner, and was in the same building on June 7, 1929; it was in the same location in June of 1921.

Q. In June of 1921, how close in your building, or to your building, did the water from the creek come?

A. Well, in a very close proximity, backing down from the railroad embankment over the basements of the building and filling our building to the extent of one or two inches. Some water came across the road from behind the Crescent Hardware Company and spilled over the entry-way down into the place where my business was located. When the water was coming over the road to my place

(Testimony of Charles E. White.)

of business I was standing right on the corner of the Nick Wagner store. Plaintiff's exhibit "X" is a correct photograph taken from the other side of the creek, of a scene which I saw that afternoon, in June, 1921.

Mr. MAURY: I offer it in evidence.

Mr. McCARTHY: No objection.

The COURT: It may be received.

I should say that that water standing at the level as shown in exhibit "X" that afternoon, in June, 1921, went down within about one or two hours.

I was acquainted with what is called the viaduct across Main or Wibaux Street in 1921. At that time, that was not a concrete viaduct, as it is now. As to the kind of a hole through the embankment that was there, it was just a mere wooden structure with piers in the middle. On the south side—the upstream side—of the [96] viaduct, in June, 1921—as to the height the water went through that viaduct and where it came from, will state that I saw the water seek its level at the railroad bridge on the east, meet the water coming from the west and join at the center of the viaduct and endeavor to make its escape at the viaduct. On the south side that water was from three to four feet deep.

Q. How far did it extend up Main Street? I mean to the south,—in June, 1921?

A. Might I explain the action of the stream as I saw it at that time?



(Testimony of Charles E. White.)

Q. Yes. Can you tell us how far upstream did it extend that evening, so far as you saw it on Main Street?

A. The water in 1921 coming from the west, as I saw it, came by the water tower at a spillway, seeking its course in a northerly direction and then swinging around here and a curve coming east of the railroad, joining together, and endeavoring to escape to the north side of the viaduct.

Q. Where did it turn east? Where did that water coming from towards the water tower in 1921 turn towards the east?

A. Well, that water came by the usual and customary backing up of that stream when it met at the embankment of the railroad——

Mr. McCARTHY: I ask that that be stricken as not responsive.

The COURT: Strike it as not responsive.

It turned east I should say within a line by the water tower—I don't remember my streets—I know the locations. Right here (indicating on relief map) and then east on Orgain Avenue.

During the years I have been in Wibaux, I have noticed a custom of that stream in ordinary recurring high rains. Describing what that custom was before 1929,—I seen flood conditions in 1915, about, —1916, 1921, 1923, and at the height of flood waters, it was customary for the water to come in from the south and meet with the resistances at the railroad embankment and back up to the [97] south

(Testimony of Charles E. White.)

of the town again and swinging around in a horse-shoe fashion, coming in on the west and meeting the current coming from the railroad bridge on the east and damming itself up at the viaduct, which appeared to be too small for a spillway. That course, I should say it was a natural thing for it to do, with no sufficient get-away. When it backed up from the railroad bridge, it would break over the embankment between the water tower and this street on the east of it—between the water tower and the street on the east of the water tower.

I was in Wibaux on June 7, 1929. My home was to the north of the track at that time, and my place of business to the south. I was acting mayor at that time. I got up about 7:00 o'clock in the morning. I went with my family to the higher ground, because there is a raise there which constitutes the valley—the raise on the west and the east. I found people homeless and driven out of their homes. When this water was three or four feet deep at the viaduct in 1921, the depth of it on my lawn to the north was about one or two inches—just high enough to trickle across the lawn—seeping over a one-inch or two-inch foundation fill of the basement of my home. That morning, the 7th of June, 1929, I went around on high land to the west of Wibaux, to care for my people who were in jeopardy. I observed the course of the water or the action of the water in the region towards the Davis Addition, and in the region of the water tower. I

(Testimony of Charles E. White.)

would like to give the reason for my observation at those points, if I would be permitted. We had people housed in one home, that was standing upon the cook-stove with their two children, with water nearly up to their waists. On the next street south, we had another family,—a woman with two children seated on the second upper ledge of her home, and I had men testing the currents on those streets to see whether it would be advisable to send a man with a wagon and team in there to see if they could stand the rise—the force of the water—to [98] see if they could get away. Consequently, I was enabled to obtain the action of that water during the entire flood period. With reference to a contact of waters—waters coming from one direction striking waters coming from another,—according to my observation, there was a continuous swirling in the town during the entire flood period. You could hardly tell whether water was coming from one direction or another. There was a continuous swirling and at the time of the going out of the Methodist parsonage, the water seemed to be boisterous and receding back from the railroad embankment to the south of the town. As it receded back from the railroad embankment towards the south and about the time the parsonage went out, there was a very turbulent rolling of water. I have seen various bodies of water rolling, and if you wish me to describe the going-out,—that disastrous happening of the parsonage going out,—I was on the



(Testimony of Charles E. White.)

opposite bank when it went out and a continuous roll of water came in from the main stream and met the back-coming current and just lifted the parsonage up and carried it out in a rather orderly manner, I should say—for water. I didn't see another building lifted up here at this point near the water tower. My attention was attracted to the parsonage because I knew the church bell had rung and that people in that vicinity were in danger.

When the flood was over in Wibaux, I was acting as mayor. I sent or joined in sending Charlie Donnelly, President of the Northern Pacific Railway Company, a telegram. Exhibit X-4 is my handwriting, and the copy; that is a copy of the telegram which I sent.

Mr. McCARTHY: I have no objection.

(Exhibit X-4 read to jury by Mr. Maury).

I got a letter in reply to that from Charles Donnelly. That is the letter.

Mr. MAURY: We offer it in evidence (X-2).  
[99]

Mr. McCARTHY: Objected to as immaterial, if the Court please, having no bearing on any issue in this case.

The COURT: I don't know but what it may be. You allowed the other to go in and I don't know of any reason why this should be kept out.

Mr. McCARTHY: Note an exception.

(Exhibit X-2 read to jury by Mr. Maury).

No report was ever made to me as mayor as the result of any investigation.

(Testimony of Charles E. White.)

Q. Do you know of any report as the result of that railroad investigation having been made to anybody?

A. No, sir.

Mr. McCARTHY: I would object to that. There is nothing to indicate that there was any report coming to Mr. White.

Mr. MAURY: He was acting mayor.

Mr. McCARTHY: Why would the railroad company make a report to him as a result of an investigation?

Mr. MAURY: Because if the investigation were adverse, they would keep it to themselves.

Mr. McCARTHY: Nonsense. Objected to as immaterial.

The COURT: Yes; I don't think it amounts to as much.

After the flood of 1921, I was an officer of the Commercial Club. I was also an officer of the Town of Wibaux; I was Town Clerk. And I was Secretary of the Commercial Club. As to matters that came up in the Town Council with reference to flood conditions and a bridge of the Northern Pacific there, will say that after the 1921 flood, our council at various times discussed in a very informal manner the cause of securing some opening that would relieve us from apparent, at least—flood conditions. As a result of informal conversation of the council meetings and the Commercial Club, I was instructed in a very informal manner

(Testimony of Charles E. White.)

to write to the railroad company asking that something be done in that particular respect. I wrote the letter as instructed, or [100] rather, as suggested. I haven't a copy of that letter that I wrote. A copy of it was available to me among the records of the city, but it was washed out amongst the other numerous things, from the place in which my basement was located,—I should say within about three months after the 1921 flood. My basement, with papers, was filled with mud. I sent the communication from the Commercial Club and from the Town, to Mr. Sloan, the division superintendent, as we understood it at that time. His headquarters were at Glendive.

Cross Examination:

(By Mr. McCarthy).

My newspaper office is in the basement of the First National Bank Building. I have been located at that present location close to twenty years.

Q. So that during all this time you were worrying about floods, you continued to keep your place of business in the basement?

Mr. MAURY: I must object. It has been ruled in these cases that people can rely on things being fixed up, and the fact that a railroad company is negligent in the matter of a bridge, cannot in anywise interfere with the use of peoples' property, unless they condemn it and pay for it. This was their land and they could use it as they wish, and they couldn't be driven out of town by the fact that



(Testimony of Charles E. White.)

a railway company would continue to be negligent.

\* \* \* \*

The COURT: I don't quite see the point you are trying to make out of it.

Mr. McCARTHY: All right; we will ask a question.

Q. Mr. White, did you write an article in your paper shortly after the flood?

A. I did.

Q. Describing the flood conditions?

A. I did.

Q. And in your article you didn't say a word about—— [101]

Mr. MAURY: Just a moment. The article itself is the best evidence.

Having been shown defendant's exhibit "C", that is a copy of my paper—the first issue published by me after the flood.

Q. Now, will you point out in that paper one word where you suggested that the railway company was in any way responsible for this flood?

Mr. MAURY: Just a moment. That is not proper cross-examination. He has the paper, and if he wants to introduce it in evidence, why that is another question. This is not a time to be arguing with a witness, and the question is improper. He can point out anything that Mr. White said in his article. If he said anything inconsistent, that goes to the jury; if he said anything consistent, that is here. Just point out anything you want Mr. White

(Testimony of Charles E. White.)

to identify, and if there is any inconsistency, we won't object.

The COURT: Refer to the article and show it to him. Let him look at it and ask him if he charged the Northern Pacific with any responsibility for the flood, and in his own words. That is as far as you can go, perhaps.

Mr. McCARTHY: All right. You heard the Court's suggestion, and I adopt it.

Q. Will you look at the article?

A. Yes, sir. I wrote the article.

Q. Now, Mr. White, did you in your paper, charge the Northern Pacific with any responsibility?

Mr. MAURY: The paper is the best evidence.

Mr. McCARTHY: All right. We offer defendant's "C".

Mr. MAURY: Objected to, except as to a particular article, which can be put before the jury and read to the jury; and we want that article read. [102]

Mr. McCARTHY: If the Court please, it is our theory—we contend there is not a word in this paper suggesting any responsibility on the part of the railway company.

The COURT: I don't see what you are getting at with it anyway; if you want to introduce that article for that purpose, that article may go in. I will admit it for the purpose you have stated.

Mr. McCARTHY: All right; I will read it if the Court please.

(Testimony of Charles E. White.)

Q. Are the headings a part of the article?

A. They are, but not mine, because the paper was printed in Glendive. The article begins right here (indicating), "On Thursday night"—

(Article in defendant's Exhibit "C" read to the jury by Mr. McCarthy).

The defendant's exhibit "C" is dated June 13, 1929; the next issue of my paper would be seven days later. You misunderstand Mr. McCarthy—

Mr. MAURY: When was the next issue published? We want to interpose objections here.

Q. I show you defendant's "B" and ask you if that is the first issue of your paper after defendant's "C"?

A. This (defendant's "C") was the first publication after the flood, and I think that after defendant's "C" came out, defendant's exhibit "B" was the next issue of my paper.

Q. Mr. White, in defendant's "B", in any place in your paper, did you suggest, intimate, or charge the Northern Pacific Railway Company with any responsibility in connection with the flood or the damage resulting from it?

Mr. MAURY: Objected to as attempting to confuse the issue and in no way tends to dispute or contradict the witness.

The COURT: If there is anything in that article [103] contrary to what he testified to on the stand, I expect you will have to submit the article.

Mr. McCARTHY: My point is, if the Court



(Testimony of Charles E. White.)

please, it is silent; it is the silence of the exhibit. It was silent as to any responsibility of the Northern Pacific——

The COURT: Well, introduce it.

Mr. McCARTHY: Defendant's exhibit B is offered.

Mr. MAURY: We object to it as encumbering the record, and too remote one way or the other.

The COURT: It seems to me you might look at these papers and introduce such portion of them. Of course, your position is—well, go ahead and read it to the jury, if you claim it contradicts anything he said on the stand, or if it is inconsistent with anything he said on the stand.

Mr. McCARTHY: My position is, it fails to make any charge against the railway company, and there is no charge of any kind in it—in any part of it. Well, it is offered for the purpose which I mentioned.

The COURT: Of course, I can't see any purpose at all. The fact that you say there isn't anything,—the jury might see something that you don't see. If you are going to introduce it, you better read it.

Q. Mr. White, will you indicate in that article

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Mr. MAURY: We object to that—there are six or eight pages in it.

The COURT: How many papers have you got you propose to introduce?

(Testimony of Charles E. White.)

Mr. McCARTHY: What I will do, I will have this checked and see if there are any articles we want to read.

The COURT: Very well. If this witness has said anything that you think is contradictory to his utterances [104] on the stand, I think you will have a right to call it to his attention. But the mere fact that he doesn't say anything, that is for you to argue. All right, proceed Mr. McCarthy.

Q. Now, Mr. White, where did these rolls of water you speak of come from and where did they go?

A. They came from the backing up of the stream at the railroad dam running to the south and meeting with the main current, and as I stated before, there is an apparent ravine, which forms a tributary to the main stream of Beaver Creek.

Q. You think it was these rolls you described that took the Methodist church off its foundation, is that right?

A. I presume a certain amount of license is permitted in newspaper accounts of—I was there,—testing the currents and looking after the people there,—and it was these rolls of water I mentioned that knocked the Methodist parsonage off its foundation. The Methodist parsonage was lifted off of its foundation and carried east on to the south-east corner of Dahl's blacksmith shop, then deflecting itself into the main current of the stream, going on down past the wagon bridge.

(Testimony of Charles E. White.)

Q. And there were countless directions, Mr. White, the rolls of water were moving from the north to the south?

A. From the north to the south and south to the north; from the south to the north and the north to the south. But the house moved from the south to the north; it moved from the south to the east first, also. Pointing it out: here is your Methodist parsonage,—this water rolled—After it came to rest, it was right down near the depot. The depot is way down here near the railroad water tank,—at least several feet from the main entryway,—but it was up on the railroad embankment. The railroad embankment is north of the site of the Methodist church and where the parsonage was before it was taken off its foundation and moved away. [105]

Redirect Examination: (By Mr. Maury).

That “narrow get-away” mentioned in the article which was read, was the railroad bridge and the viaduct.

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S. P. RIFE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Colton).

My name is S. P. Rife. I live at Miles City, Montana; have lived at Miles City 5 years and 9



(Testimony of S. P. Rife.)

months. I lived at Wibaux before I went to Miles City. I lived at Wibaux about 17 years, in the town.

I was in Wibaux during the month of June, 1921. There was a rain occurred at that time; that rain occurred about 2:00 o'clock in the afternoon. At that time there was a cloud come up from the southwest and it didn't look like it was going to be much of a cloud, and it assembled into a hard rain and it rained for about 30 minutes and it quit altogether and it gave me time to get home, and it started in a downpour and rained hard, steady downpour for two hours—rain and hail. During the first 30 minutes while it was raining, I was called by one of the men I was in business with, to come out and see what was going on, and by that time the water was coming in over the creek banks five or six inches, rolling in over the creek banks, on both sides of the creek, but where we could see it the plainest was on the east side of the creek; and it continued to come in like that during the length of the time it rained for about two hours, and it kept on raising and kept on raising until it came up to my house. My house was located right in there (indicating on relief map),—right in that corner (that is west of Wibaux Street and north of Second Avenue South, and the first little house there on the corner). That house stands on a foundation probably one foot from the ground. [106] and it just got up to run into the basement and just started to run into the basement when the

(Testimony of S. P. Rife.)

water started to recede. During that flood of 1921, as to how far north on Wibaux Street from the creek the water got, it just come to the Crescent Hardware store right on Wibaux Street. During the 1921 flood, it covered practically all of the town west of the creek and south of the railroad bridge and about half of the town east of the Beaver Creek and south of the railroad.

Q. And how much of the town was clear in water and describe to the jury on this plat?

A. Well, this was my place of business at that time; it was supposed to be in that building there; that building is just north of the south—north of Second Avenue South and west of Wibaux Street. Here is the street coming in from the east; here is the Crescent Hardware store; this is supposed to be the Drake building. The water come clear down to this corner here, say to 20 feet, then it went in through there. From the intersection of First Avenue South and Wibaux Street, north to the intersection of Wibaux Street and Orgain there wasn't any water. Water conditions to the west of Wibaux Street: this water that came in by my place, part of it came in there; the other part flowed through a swale here by these buildings. Those buildings are,—well, Mr. Paulson lived in one of these houses here, and one of these is the Kinney house and that street comes right in through there and then it comes down through this swale here; this was the Thompson barn. The Thompson barn is north of Second Avenue South and east of E

(Testimony of S. P. Rife.)

Street; the water would come right down through there and through here and meet here, and come out here by the Orgain building and come up to the railway and down this way,—going north to the railroad track and turn east on the south side of the railroad track, to the viaduct. But there was no water from this place to there, but this practically——

Mr. HALL: From Orgain Street down to the Crescent [107] Hardware Company?

A. Yes, sir.

I was not over in the Davis Addition during the evening of the flood of 1921.

After this water raised,—well, I see the water raising and still coming up, and I wanted to know the conditions and what might happen in case I would have to move, because the water was raising so fast, and I went over to my place of business and I seen the water coming to the floor, and I went to the railroad bridge to see what chance—to see about the water getting through there, and to see if there was anything to block it,—to dam the passageway, and I went to the viaduct and to the depot and down to the railroad bridge. When I was down to the railroad bridge, I observed it was just about the capacity of the railroad bridge; it couldn't go through there and it was banked up on the south side and unable to go through there. I noticed some poles and bridge plank go through the bridge that evening. Those poles come downstream and as they entered the railroad bridge, as you would describe



(Testimony of S. P. Rife.)

it, they would come down and dip down and fly up, and then they would come up below the railroad probably 150 or 200 feet. The difference between the depth of the water on the south side of the railroad embankment and the north side, there was a big difference, but it was pretty hard to judge, looking at it straight down, but I should judge about 6 or 7 feet higher on the south side than it was on the north side.

Having been handed plaintiff's exhibit 2, I know what that is.

Mr. McCARTHY: No objection.

I can't tell exactly the year, but there were several years that this occurred. That is a break-up in the spring, of the water—of the ice and the water jammed and flowed back, and the ice drifting back against the bank opposite my place of business and by Charlie Dahl's blacksmith shop. That place of business is two and a half blocks south from the railroad embankment. I can't say [108] exactly how often I have seen a scene like that in Wibaux, but possibly four or five different times during my stay in Wibaux. During those four or five times to which I just testified, the usual action of the water was to come downstream and when it couldn't get through at the opening at the railroad, it would whirl back and throw the ice back on the sides of the creek and dam back up; that is what shoved the ice back up in the road. I have seen those chunks of ice laying up by my place of business, but at this time, they were laying over on the bank, according to that picture. But I have seen them clear up in

(Testimony of S. P. Rife.)

the road in front of the blacksmith shop.

I am acquainted with a gentleman by the name of John Presthus at Wibaux. I couldn't tell you just when he came there—whether he came there after I did or before; I think after I came there. I located in the town of Wibaux proper in the spring of 1911, and I met Mr. Presthus probably two or three years afterwards,—I couldn't tell you when. He was working as section foreman for the Northern Pacific during all the time I knew him there; and he is still working, as far as I know.

In 1907 I was on a ranch about 30 miles southwest of Wibaux—mostly south. That year there was a similar rain and flood.

I was a member of the Town Council during 1923.

Q. I will hand you a book and ask you to tell us what this is?

Mr. McCARTHY: There is no question. That is the town meeting or minute book is it? We don't question the authenticity of the book, but we may have an objection as to the materiality of the matters there. There is no need of proving the book by the Town Clerk or anything of that kind.

Q. Were you present at a meeting—

A. I was.

Q. Held at Wibaux on the 7th day of March, 1923, in which your name appears as alderman there,—were you present at that meeting, [109] and particularly drawing your attention to the second to the last paragraph for the purpose of refreshing your recollection,—does what is said in that para-

(Testimony of S. P. Rife.)

graph to which that refers,—did that particular matter transpire? Were you present?

A. I was.

Q. And that particular matter did transpire?

A. Yes, sir.

Mr. McCARTHY: If the Court please, there is no objection to the particular part they speak of. There are matters contained in the book that we would object to. Now, if the part that Mr. Colton has in mind now can be drawn off by the reporter,——

The COURT: It is a part of a resolution adopted by the Town Council, is that it?

Mr. COLTON: I am just going to read the paragraph.

Mr. McCARTHY: All right.

Mr. COLTON: (reading) “The Clerk was then instructed to write to the Superintendent of the Railroad in this Division and see what could be done to carry off the flood water in the vicinity of the elevators.”

Q. Drawing your attention to a meeting of the Town Council held at Wibaux on April 3, 1923, and particularly drawing your attention to the fourth paragraph,—I am asking you to refresh your recollection and see if that did not transpire?

Mr. McCARTHY: Objected to as irrelevant and immaterial and having no bearing on any issue in this case and not in any way binding on the defendant, merely being a direction to the Clerk and nothing to show that it was ever carried out.



(Testimony of S. P. Rife.)

Mr. MAURY: The Clerk will be here in the morning.

The COURT: Perhaps you had better introduce it through the Clerk. Just as it stands, it wouldn't amount to anything because no direction was ever given—it wasn't carried out. [110]

Mr. MAURY: All right, we will have the clerk here tomorrow and present it again.

Immediately following the 1921 flood, I attended a meeting where certain officials of the Northern Pacific were present. That meeting was held in the Commercial Club rooms at Wibaux, Montana.

Q. State who the gentlemen were who were there at that time?

A. It is a long time to refresh your memory, being called on short notice, as we were at that time,—I wouldn't attempt to state who were there at that time, but I have a faint recollection of the description of the man. At that time, or now, I wouldn't swear as to their person. But I can give the description——

Mr. McCARTHY: Well, we object to any evidence being received here as men purporting to represent the Northern Pacific as not binding on us. We don't know who they were; we don't know whether they had any connection or not.

The COURT: He ought to identify some one of the group.

Q. What was the purpose of that meeting?

A. The purpose of that meeting was to ask the Northern Pacific if they wouldn't lengthen the

(Testimony of S. P. Rife.)

bridge across the railroad, and repair or fix the viaduct as they put it in in 1912.

Q. And was that matter discussed at that meeting?

A. It was.

Mr. McCARTHY: Objected to as immaterial as far as we are concerned.

The COURT: Yes; you haven't laid much of a foundation here for a meeting that would warrant the introduction of testimony along this line,—without showing when and where and who was present. I will sustain the objection, if you can't tell us more than that about it.

Cross Examination:

(By Mr. McCarthy).

The county bridge is located south of the railroad [111] embankment, and west—slightly to the west. I don't know exactly when the foot bridge was put in that is shown here on the relief map. There was a cinder walk along there for a number of years and then they put that in,—I don't know what year. It was after the high water that the people couldn't get across to the foot bridge there, that they put that up. If any ice blocks were thrown up on the land in the vicinity of Dahl's blacksmith shop, or in that general locality immediately to the east of Wibaux Street and South of First Avenue South, those ice blocks would not be blocked by the county bridge before they would be blocked by the railroad track, because when ice would first break up, it would break at the railroad bridge and then

(Testimony of S. P. Rife.)

float in under until the water got so high, it would float back by the Orgain Building and in the vicinity of the depot, and then it would continue until it got blocked back to Massey's place and my place. My theory is it was blocked upstream from there——

Q. Your theory is it was blocked upstream from there? It was not ice coming downstream?

A. That is what it was. When it was just ordinary, it could go in under. When it got too much,—it got so much, it would flow sideways and leave a current in there and the ice would shove back from the railroad bridge to the low land.

Q. Wasn't that due to a dam in there?

A. There was a dam in there for a number of years and it was finally blown out, and it couldn't get through there. That probably, is what caused this ice—because the dam was there and creating deeper water.

Redirect Examination:

(By Mr. Colton).

I have seen ice jams there since the dam was blown out; any year there is sufficient water in the creek to make ice, there is an ice jam. I couldn't say when it was blown out—whether 1915 or 1916; I think it was the spring of 1916 when the dam was blown out. During the early days when those ice jams were there, [112] I noticed a young fellow riding on ice cakes. The creek would raise, as I stated before, and the ice would float back to the



(Testimony of S. P. Rife.)

banks and there would be finally, a channel running through. There was a young fellow that kept walking out on this ice and he would jump onto this ice and go down the current and as it passed the railroad bridge, he would grab up and jump off onto the railroad bridge, until he finally fell in the water and he quit. The ground east from the county bridge towards the elevators is low; it is possibly four feet lower than the bridge.

Recross Examination:

(By Mr. McCarthy).

After this letter was written to the railway company about the water around the elevators there, the railway company put in several culverts in the elevator-side track there, to take care of the situation.

(By Mr. Maury).

I have seen those culverts—the culverts that were put in there. I don't recall whether the culvert to the east was lower down in its bed than the culvert to the west.

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ARTHUR BARCLAY,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

I have lived in Wibaux County and near the town of Wibaux since 1909. In 1921 I was county sheriff. I recall a high-water at Wibaux in that year. The

(Testimony of Arthur Barclay.)

rain fell about 2:00 o'clock or 2:10 in the afternoon. I know where the Davis Addition is. I was on the west side of town when the water fell, that is west of the creek and south of the railroad, up on the hill. I went over into the Davis Addition that afternoon. I went over part way on a truck. I could cross the county [113] bridge, when I went over. \* We went through Main Street here on a truck and over this way across the bridge and down this street, and when we got down to about this point, right here, we got off from that truck and we stopped there to relieve some people—went to this next corner right here; I and a fellow by the name of Frank Berry walked over here——

Mr. HALL: What street is that?

Mr. MAURY: Alice Street—to the east.

And we helped some people out right here——

Mr. HALL: That is the junction of Alice and what?

Alice and Bushman. Here is Harry True's residence at this corner. The water there was up to our waists; and the fellow was shorter than I,—he slipped and went out of sight. And after helping these people, we went over to this house (indicating the extreme northeasterly house in the Davis Addition, and south of Alice Street, west of Regina), and I carried two ladies out of this house. The water there was up to my waist. As to how long the water stood at that depth: well, we got these people out of this house and went up this alley and

(Testimony of Arthur Barclay.)

got a few more out, and then I left there—I don't know just how long,—it was up high all afternoon, and then I came over to the railroad bridge; this is the railroad bridge here. As I crossed the railroad bridge, the water was high and it was ducking in under the bridge—that is, timbers and things like that, that came. I could observe a difference in the height of the water to the north of the bridge and the water to the south,—well, of course, somewhere south of the bridge,—early in the afternoon, it was quite a bit higher, but late in the evening it got up, because there was an awful flow of water came on the north side of the bridge; late in the evening, there was water on the north side—it come down on the north side.

I lived right in town, but my farm is six miles east,—south- [114] east of Wibaux. During that flood of 1921 the railroad tracks near the elevators were washed out and ties set up on end. Those tracks were washed in both directions there; they were washed—in some places, it was twisted up this way and other places, that way.

Q. By “this way” and “that way”, would you say parts of them were washed away from the railroad embankment and parts washed towards it, or how?

A. Yes, sir.

Q. Is that the thing you intended to convey?

A. Both ways, yes.



(Testimony of Arthur Barclay.)

As to how much of the passing-track or side-track there was washed away in 1921,—well, that switch was pretty well cleaned out there; I don't know just how many feet it would be. In that flood of 1921, there was a washout right at the east end of the bridge. At the east end of the bridge during that flood, that tore quite a bank off of it,—and a light pole, and there was quite a bit of water—quite a bit of dirt taken away there where the water collided; you see the water coming down on the north side of the track and this coming through here, it tore out——

Q. About how many feet long would you say that was that was torn out of the railroad east of the bridge in 1921?

A. I wouldn't—I don't know—probably twelve or fifteen feet, something like that.

Q. Now, from there on east to your ranch house, what happened in 1921 to that railroad?

Mr. McCARTHY: Objected to as being immaterial, if the Court please, not having any bearing on Beaver Creek, or the bridge over Beaver Creek, as to what happened six miles east.

Mr. MAURY: We intend to show the intensity of the flood.

The COURT: I think so; overrule the objection.

Mr. McCARTHY: Exception.

A. Right up on the hill beyond the stockyards, there is a draw there and water came through there, it softened the track and [115] washed it out, and

(Testimony of Arthur Barclay.)

an engine tipped over; and east of the crossing, one mile east of town, the track was washed out there three or four places between there and Yates. Yates is about five miles east of Wibaux.

Q. And washed out in three or four places. Describe how far the rails were moved from their previous position?

Mr. McCARTHY: May it be understood that the objection, ruling and exception, may apply to this entire line of testimony?

The COURT: Yes.

There was one place that the rails were clear out in the highway, they were north of the track; the track was broken and the rails were clear out in the highway. I would judge those rails were washed from the railroad bed 150 feet—150 feet from where they had been before—from the main track.

I know approximately the contour of the watershed of Possum Hollow. There is about 550 or 600 acres maybe, in that watershed. I have seen water coming from Possum Hollow and striking towards Beaver Creek a good many times. The course or courses that it takes after it gets to the Davis Addition, it comes down this way, and I seen it go that way too. Instead of "this way", I am taking the ruler and showing the court, jury and counsel. I have seen water just south of town here, it comes down through here, through here; and I have seen it go down this way too—right through here.

(Testimony of Arthur Barclay.)

Mr. MAURY: Indicating a line—Who lives in these houses here where you indicated the course that you have seen it take? Do you know who lives there?

A. I don't know whose house is there.

Q. Well, have you seen it take a course through these five little houses to the west of Drake Street and to the south of Olive Avenue? This is Olive Avenue; there is Drake Street. [116]

A. Right through here (indicating), I have seen water.

Q. You have seen water back up?

A. I have seen water from the stream come down and go right through here in the Davis Addition—before it can go through there; before it is high here.

Q. Now, this other water course from Possum Hollow——

A. Right south of town there, I have seen water come in this way, as well as this way from Possum Hollow.

Q. And the one “this way” goes toward the word “Drake” on the plat? Is that the course you wish to——

A. Yes; right in thru here.

Q. Yes. Towards the word “Drake”. And how deep have you seen it come down Drake Street from that point over at Possum Hollow? (You may sit down now.)

A. I don't recall just how deep I have seen it. I have seen it go through that way several times;



(Testimony of Arthur Barclay.)

and in high water, I have seen high water go through the other way to the Davis Addition—water that came right down the main stream.

In going from my office in town or from my home in town, to my ranch, while I was Sheriff, I went over the county bridge,—the county road. As to the condition of water standing on the road between the county bridge and the elevators that I have seen in the springtime,—will say that I have often seen—I have had to wait several times for the water to recede a little driving through there; any time there was high water, we have had to do that. I don't remember just what years I have seen that, but any time we have had high water. I have often seen ice cakes right on the highway there—lots of times.

Q. And what would be the condition of the surface of that water between that point that you describe, or those points, and the railroad embankment?

A. I don't quite understand you.

Q. Rough or smooth? Flowing fast or stagnant?

A. Well I have often seen the water come down there a pretty good speed, and I have seen it when it wasn't a good speed. The water, when that [117] comes down there and fills up, the speed isn't as great then. As to how often I have seen it fill up there before 1929,—well, the 1921, and different floods in the spring; I couldn't just tell how many times, but a great many times. In the spring of

(Testimony of Arthur Barclay.)

1919. In 1919, we had quite a lot of trouble with water there. We did down to the Brophy bridge too, with ice going out.

Q. How long did the water stand there in 1919, if it did stand there?

A. Well, if the ice run out of a sudden, it would come down and pile up there on both sides of the bridge, and the water would recede and ice would be on the banks.

In plaintiff's exhibit 2 appears a high building. That is the Wibaux County courthouse. I think it was in December, in 1919, that that building burned down.

#### Cross Examination

(By Mr. McCarthy).

In 1921, when this rainstorm came in Wibaux, it rained very hard. It rained in the general vicinity of Wibaux; of course, the storm wasn't confined to the city limits of Wibaux; I think the storm came up from the southwest—the clouds came up from the southwest, but the bulk of the storm hit east I think. Rain fell over on the cemetery hill, some,—and over in the vicinity of the Wibaux monument—well, not very much west of there, I don't think. The rain was heavier on the east,—the south and east—side of town than it was on the west side of town. Whatever rain there was falling over there on the hill towards the cemetery would

(Testimony of Arthur Barclay.)

naturally run down towards the town, and what rain there was in the east, falling in the drainage area of Possum Hollow, would pour down through Possum Hollow; it drained all it could; it drained all through there. As I came over into the Davis Addition, after getting off of the wagon that I came on and proceeded east and south, I found the water getting deeper and deeper as I went along. [118]

Q. In other words, the further away you got from the creek, the deeper the water?

A. Well, the more time we gave it, the deeper it got, yes, sir. As I went away from the creek, the further I went, the deeper the water got—for a time.

Q. And you were convinced, weren't you Mr. Barclay, that the difficulty you found with the people over in the Davis Addition was due to water from Possum Hollow and those sidehills?

A. Well, Beaver Creek was full.

(Question repeated):

A. No, sir; not wholly convinced.

Q. Mr. Barclay, I show you a certified copy of a portion of your evidence given on page 3176, case No. 2444, in the District Court of Fallon County, tried at Baker, Montana, on the 6th of January, 1934, calling your attention to the question and answer at the bottom of page 1, and ask you to read that?

A. Yes, sir; do you want me to read it out loud?  
“Q. The difficulty you found with people over in the Davis Addition was due to water over in Possum Hollow? Answer: Yes, sir.”



(Testimony of Arthur Barclay.)

Q. That was your testimony at that time?

A. I expect I testified to that; yes, sir.

When this water came down from Possum Hollow, I told you this morning, that some of it ran in one direction and some of it ran towards the elevators. I have seen it do that. Looking at the relief map, I see natural depressions in the ground are indicated—the natural depressions in the ground indicated here on the relief map, it shows a path that would carry water right down towards the elevators,—that is the direction as near as I can remember, although there is a deeper one over that way, I think, than what shows there.

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R. V. MASSEY,

being first duly sworn as a witness in behalf of the plaintiff, testified: [119]

Direct Examination

(By Mr. Maury).

I moved to the place where I was living on June 7, 1929, in the fall—October, 1924.

Q. Where is that place on this profile?

A. Do you want me to show it? You are pointing to it. That is where my buildings are.

Mr. MAURY: I call it a profile. That is our language.

(Testimony of R. V. Massey.)

Mr. McCARTHY: Just so the record is clear. He is pointing to the exhibit that is introduced here as a relief map.

The COURT: Very well.

Q. On this profile, am I pointing to your buildings?

A. Yes, sir. My house on this profile (witness measuring) from the extreme south end of the map—that is, to this edge of the profile, measures 20 inches.

On June 7, 1929, I was at home. The morning of the 7th I was awakened by an airplane, about 5:00 o'clock. I got up. At that time, Beaver Creek was very high and of course, I was interested in my stock that was in my pasture and I proceeded to get my stock out of the pasture because they was in water. I recall a cutbank here, and marks on the cutbank at that time, which would aid me in telling the jury how high the water was when I got up. I noticed the cutbank on the southeast of my house along the creek, had a strip between the surface and the clay there—there was kind of a strip there, about two or two and a half feet, and the water was about that high at that time, from the top,—within just about two to two and a half feet of the rim of the bank. That cutbank is right in that vicinity where you are pointing. The stream has moved since then; it has moved west. On June 7, 1929, I would say the stream was at the point you are now indicating—a curve to the southeast of my house. [120]

(Testimony of R. V. Massey.)

As to how the water looked across the flat at that time, south of my house and west of my house, it was very high and covered all the lower portions of it. We then proceeded to get our cattle out of our pasture and take care of things that we could there. My horses at that time, were standing northwest of our buildings, scattered out kind of on low spots there at that time when I got up. I had ten head of work horses and two colts,—one sucking-colt and one two-year-old colt. Pointing out with the ruler where those horses stood or moved around during the entire period of the flood in Wibaux on June 7, 1929, will state that northwest of our house there is kind of a high spot of land, and they gradually got to the high point on there on the north side,—I should judge in there (indicating). It took about one hour from the time we got up in the morning until they was on that island.

Q. After the waters receded in Wibaux, where were those horses?

A. They were still on the island the next day—the next forenoon. The sucking-colt was all right. The depth that the water got on the legs of those animals, I should judge it was about half way to their stomachs; perhaps a foot and a half high, or maybe a little better.

From our residence that day, we went up on the hill as soon as the water began to come over the bank between the house and the road. Some of the water came over a low place between our house and the road,—you take southeast of our house, the



(Testimony of R. V. Massey.)

water began to come over about 6:00 in the morning and we proceeded to the hills. My son was there in the house besides Mrs. Massey and I; he went with us. As to our vision from the hill where we went to, all during that morning,—we could see all over our place practically; and we was watching our horses on the island to see what was going to happen. We figured they probably would leave there and get tangled up in some wire or something and get drowned. We left at our house, and around it,—well, we had quite [121] a bunch of little chickens, perhaps 175 I think, to be correct, that was parked around in boxes around our house, outdoors, out in coops; they was on the ground, sitting on the ground. When we came back, after the water had receded at Wibaux, our chickens were all right. No water got in our house. At about 3:00 o'clock in the afternoon, the height of the water still running in the creek near the point where I had observed it in the morning,—I should judge it was right close to about what it was when I got up in the morning—about that. It kept receding from that time on, of course. As to the height of the water the evening of the 7th, about bed-time, it was perhaps down a couple foot below,—about four or five feet lower on the bank than what it was about noon or sometime around there. The water receded from the ground from our house, I should judge between 11:00 and 12:00 o'clock we walked home from the hill and the road was dry there.

(Testimony of R. V. Massey.)

Afterwards, I pointed out the high-water marks to Mr. R. A. Lyman across the creek opposite, west of my house. When I pointed them out, I think those marks were still observable to anyone who knew where to look for them; they are observable yet, I think.

Q. There are still enough of the vestiges for anyone to go there and find them,—I wouldn't say as to the exact height, but there is evidence there to show how high the water was. I never pointed out those marks to Mr. Oien. He never was pointed out those marks that I know of, by myself or by any of my family; he never requested me to give him the marks. He has requested me to show where the horses and colts stood on that day; they asked me if I would show them where the horses stood on that island, and as near as I could, I pointed out that spot to Mr. Oien.

I didn't observe no wall of water that morning. There was not very much of the time after I got up at 5:00 o'clock that my attention was not directed towards the river.

Q. Could there have been any such phenomena as a wall of water [122] passing your place without you having seen it?

Mr. McCARTHY: Objected to as calling for a conclusion of the witness. He can tell what he saw and what he didn't see.

The COURT: Yes.

Describing how much attention I was paying to the river there from 5:00 in the morning until I

(Testimony of R. V. Massey.)

returned to my house in the afternoon,—well, of course, we was very much interested in what was happening and we kept very close watch to see whether our buildings were going to go and whether our horses were going to be washed out, and we was pretty much excited over it—in regard to what was going to happen,—and we watched it closely all the time. It was, of course, broad daylight when I got up. As to when daylight comes (for the purpose of the record) the first week in June,—it was good and light so we could see everything. I think the sun was up—I am not sure—but I think it was. As to how long the water stayed, standing at the high-water marks that I showed Mr. Lyman, it was sometime—perhaps 7:00 or 8:00 o'clock. The reason I am saying this, there was at our gate post was about a foot and a half of water at the high time; that happened sometime between 8:00 and 9:00 o'clock—in front of our house and between where he was on the hill. That went down once and then came up perhaps a little bit higher. I couldn't say how much difference there was in those two rises, but perhaps a couple inches or so. I should judge the second raise come perhaps 10:00 o'clock or such a matter—maybe a little more.

We could see the railroad bridge from where we were at, and from my house too. My house from the railroad bridge, in a direct line straight across, it is probably a little better than half a mile, perhaps close to three-quarters of a mile. I don't know exactly, as you could see the county bridge from



(Testimony of R. V. Massey.)

my house or not; you might see the top of it a little,—that is about all. [123]

Q. Mr. Massey, did some member of your family take a picture of the flood of 1921,—a photograph—an old photograph? I am calling your attention to plaintiff's exhibit "X".

A. Well, now, that might have been taken by some of our family, but I don't remember it; it was in our house there; for how long I couldn't say.

Cross Examination:

(By Mr. McCarthy).

It was in October, 1924, that I moved on there to my present place,—residence. Mr. T. H. Rush lived there before me; his first name is Tom. From 1924—from the time I moved in on this farm or ranch—until June 7, 1929, I had never seen any water that high up around my place like this before. In 1929, on June 7th, I got up in the morning and the creek was rising, and it kept on rising until I thought that in the interests of safety of myself and family, I had better get to higher ground, and I went across the road directly east practically, to that high ground as shown on this relief map. While I stood around there that morning, I continued to watch the water. The water was flowing. Of course, there was plenty of debris in the water that morning going down toward Wibaux; that would be, generally speaking, in a northerly direction. As to what were some of the articles or animals or debris that I saw,—there was one in particular,—a

(Testimony of R. V. Massey.)

jack-rabbit that come down, that was in the stream; I seen something moving its ears up and down and I seen it was a jack-rabbit; it was still alive and he would float two or three rod and his ears would come up. The jack-rabbit was going with the current. The current was going in a northerly direction.

Q. Can you take the pointer here, Mr. Massey, and run a line from your house towards whatever direction the water was going?

A. You see the city water tower here that I am referring to,—and this is the Senator Kinney house; this is the church here. It was [124] going, perhaps the main stream was hitting in right in west of my buildings there, and hitting just probably that direction, as near as I can figure it out. As near as I can figure, the force of the current was striking about half way, approximately, between the city water tank and the Miller house,—somewhere about in there; that is about as near as I can figure it out. The Miller house is the house to which you are pointing, previously identified in the record. The city water tank is this building here,—closely resembles the city water tank. The force of the water, as I saw it, was striking somewhere half way between those two points,—I should judge that would be it.

I did have a cow barn at my place. That is shown on the map by a white line here on the edge of the bank south of my house.

(Testimony of R. V. Massey.)

Q. Prior to June 7, 1929, did you ever have any water in that cow barn?

A. None until—not to speak of—no, I don't know as there ever was any water in there; there never was any water in there that I remember of, until June 7th. The water got in that cow barn June 7th, clear to the top. The top of the cow barn is level with the soil—level with the ground.

This water I spoke of, I would describe it as moving quite rapidly. From watching the debris and jack-rabbit and other articles being carried down in that water, whether I could give you any idea how fast the stream was flowing,—that would be pretty hard to estimate I suppose; I couldn't say just how fast, but it was moving quite fast. I would think that it would be going faster than a man would ordinarily walk.

On the morning of June 7th until nightfall—that night at any time—I didn't see any water backing up at my place. It continued to flow at all times, generally speaking, in a northerly direction. The speed or velocity of the stream might have changed some during the day. But at any rate, throughout that entire day of June 7th, there never was a time around my place that I saw the water [125] standing still or backing up,—not a particle; it was flowing at all times, and flowing, generally speaking, in a northerly direction.

Q. Mr. Massey, you said you didn't see any wall of water there that day on June 7th. Did you hear any talk?



(Testimony of R. V. Massey.)

Mr. MAURY: We object as not material—any talk around.

The COURT: I think that is indefinite. Where? By whom? In whose presence?

Q. Were you in Wibaux,—in town, the day of June 7th?

A. I went down to the railroad bridge perhaps about 2:00 in the afternoon, and someone told me——

Mr. MAURY: We object.

Q. Did you talk with some farmer while you were down in the general vicinity of the railroad bridge?

Mr. MAURY: We object as not material.

The COURT: Sustained.

I spoke of a rise of water—water raising on the gate post and then a second raise. I should judge that the second raise took place, as near as I can remember, sometime around 10:00 o'clock—it might have been before and it might have been after; but it was around 10:00 o'clock I should judge. As to how much of a raise that second raise was,—it raised to about a foot and a half high on the gate post. Before the second raise—as to how much the water came up during that second raise above what it was before that, I should judge perhaps two or three inches. The first raise took place there between 6:00—it begin coming across our land there about 6:00 in the morning, and I should judge probably again at 7:00, or 7:00 or half-past, it was up perhaps a foot or more. The water went down once

(Testimony of R. V. Massey.)

in between 7:00 o'clock and 10:00 o'clock, but the exact time I couldn't say what time it was, but I should judge it to be somewhere in between those two times. [126]

My house sits on ground quite a little higher than the bottom of the creek, and my barn sits up on quite a high place. This island that I speak of, that my horses were on, that is ground that is higher than the surrounding land, and water got up on that island and it got up on the colt and on the horses. What I mean is that with this flood going on, an island was formed there that the horses took refuge on. Ordinarily, all that land in the vicinity of the so-called island is dry. The relief map here shows, generally speaking, the course of the stream after leaving my place, ordinarily. What I mean is, that the land all through here was covered with water at the time of the flood. The width across the water there west of my buildings was all of 600 feet. There was water in the road to the east of my buildings,—the road as indicated on the relief map by the brown or burnt sienna line, that is to the east of my buildings—I imagine that is what is supposed to be the road there,—indicates the road.

### Redirect Examination

(By Mr. Maury).

The speed of the water to the east of my buildings as compared with that in the river,—they both was running very swift. At the deepest point of

(Testimony of R. V. Massey.)

that water to the east of my buildings, I imagine it was probably a foot and a half deep. I never did measure the width of it, but it must have been, of course, around 150 to 200 feet. The cow barns beneath the bank are not in the same condition now that they were on June 7th.

After I got up that morning of June 7th there was no rain fell from the sky. As to how long it had been since there had been any rain at my place previous to the flood, will say that we had had considerable rain at that time, but just what periods I couldn't say, but the ground seemed to be pretty well saturated at that time; it had been saturated perhaps two or three weeks before the flood of June 7, 1929. During the time from 5:00 in [127] the morning until I got back to my home that afternoon, there was no rain falling. As to when it stopped raining that night and in the night of June 6th or early morning of the 7th, will say that my wife and child was at Beach that day and they didn't come home until 11:00 that night and I knew it was raining slightly when they come home. We didn't retire until about 12:00 and it was still raining some. When it ceased I couldn't say,—but none after 5:00 o'clock.

#### Recross Examination

(By Mr. McCarthy).

In June, 1929, there was a bridge over Beaver Creek to the south of my place,—about three-quarters of a mile I should judge, south of my buildings.



(Testimony of R. V. Massey.)

I couldn't see that bridge from the high ground that I took refuge on. There was a so-called yellow house in the general vicinity of the city water tank, and it was washed away, but, standing on the high ground where I was to the east of my place, I didn't see it go and I can't state what happened to it—any more than it was gone; I know the yellow house was there before the flood and that it was not there after the flood. I could give you a pretty good idea of where that yellow house was located—where it was before the flood. Pointing out on the relief map, this is the water station (indicating a small building directly to the south of the city water tank). Now, this yellow house you mentioned set on a bank, I should judge, approximately there; it is a little ways north of the creek there, (indicating). As to whether it would be fair to say it is approximately half way between the pumping station and the building directly to the right, or east of the pumping station, I will say that I think it was closer to this building here; I think it was more to the east—it might be; it is about southeast from the water tank. I do not know now where the yellow house was washed to,—I don't remember. [128]

Q. Mr. Massey, as you stood up there on the high ground to the east of your place on the day of June 7, 1929, and you saw this water moving along rapidly in the manner that you described, the main current striking where you have indicated, namely, half way between the city water tank and the so-called green house, or Mattie Miller house, could you see what

(Testimony of R. V. Massey.)

was happening to the water when it got down to the stream between the city water tank and the green house?

A. No, I couldn't tell what was happening down there; that was too far for us to get a real view of it to tell what was happening there,—any more than we might see water flop up or something like that. I did see water flop up; it flopped back in the stream I suppose; I could see little ripples, you know; I couldn't tell whether it was going over the bank towards the town there,—the distance.

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WILLIAM LENTZ,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

(By Mr. Colton).

My name is William Lentz. On the morning of June 7, 1929, I was on the east side of the creek, due north of the bridge. My house doesn't appear on this profile or this relief map; it would be right off in there; that is straight north of the railroad embankment (indicating from the railroad bridge No. 184, straight north), beyond the edge of this profile. I should judge my house is about 400 yards north of the railroad bridge.

I got up at quarter past 4:00 the morning of June 7, 1929. It was the water in fact, that woke me up;

(Testimony of William Lentz.)

I could hear it roaring along there in the creek about 150 feet I suppose,—maybe a little more—east of the creek. The first thing I done when I got up was to go and get the car out of the garage and load up what I could and get up on high ground. I looked towards the [129] south, toward the railroad bridge, after I got up on the high ground. You can't see the railroad bridge from the house until you get up on this raise. Then I looked towards the bridge. \* I stood there on the raise; I had no other place to go. My wife went up too. Mr. Rourks and I stayed there and watched the water coming under the bridge and eventually, it closed off the view under the bridge altogether and it looked as though the water was running that way (indicating). When the opening at the bridge filled up, the water was like it was going over a fall; from where I stood, it looked to be 10 or 12 feet high, that is, from the bottom to the top of the water there under the bridge. I was looking from the north towards the south. I stayed there until the embankment went out on both sides; that was on the east and west side both. I couldn't tell you the exact time of day that was; I should think it was around 10:00 o'clock. At that time, around 10:00 o'clock, it looked to me to be about 30 or 40 feet of the embankment that went out. I couldn't tell exactly, on the west side, that was the first that went out. I couldn't see the east side from where I stood along there by Schuster's. After the embankment went



(Testimony of William Lentz.)

out, the water started to raise up on the north side.

Plaintiff's exhibit P-2 is a screen off of my west window in the front room; this is the top. Those streaks—there are certain rust marks on this piece of screen, this exhibit. Those marks is either the raise or the fall of the water on the level every time the bank went out,—that is all I can say, that is,—I should judge. That is all I can say; I don't know; it is according to the water's raise or the lowering of the water from the top when it got the full height. This piece of screen was facing the creek—facing the west. The 1921 water mark is not on there.

Mr. McCARTHY: Q. Is it your claim, Mr. Lentz, that these rust marks show different heights of the water [130] that occurred on the same day?

A. Yes, sir; and the water had never been up on that screen before or since, for I put them there; and the top mark of that corresponds with the water mark in the house at the present time—4 feet, 2 inches.

Q. Mr. Lentz, how do you explain that water would cause marks of this kind? Why wouldn't you figure that the entire screen would be discolored as high as the water got by the breaks in it?

A. That would be, I should judge, through the breaks in the bank; every time the bank would break out and part of the fill would go on the west side and east side, that would raise the water down there. The water couldn't get away on account of

(Testimony of William Lentz.)

the water ahead of it. The screen was up on my window like this, and I don't know how fast the water raised. It is my theory that at one time at least, there must have been water up to the top of this screen. I could not tell you or explain the difference between the clean spaces and what we call the rust spaces, but I have got pictures of the house—

Mr. HALL: Q. Mr. Lentz, you were not there until after the water went down were you?

A. I was within 150 or 200 feet while the flood was on, until the bank went out and the water started to recede.

Mr. McCARTHY: There is no objection; let it go in.

Mr. COLTON: It is offered in evidence. (P-2).

The COURT: It may be received.

I showed Mr. Lyman certain high-water marks there at my place.

Q. Showed them in 1929?

A. Yes, sir. I showed those marks honestly, truthfully and correct,—just the same as I did the other. [131]

Cross Examination:

(By Mr. McCarthy).

Q. You noticed on this exhibit—the screen—what we might call clean spaces in between the rust streaks, as you term it?

A. I don't know how they got there.

(Testimony of William Lentz.)

Q. I say, you noticed that?

A. Yes sir; I am a little hard of hearing. I noticed the clean spaces in between the brown or rust streaks. In fact, I know that the water came up to the top of that screen. I could not give you any explanation of why there would be rust streaks and clean breaks in between those rust streaks.

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Mr. JAMESON: In connection with the testimony of the witness White, we have now examined "B" and indicated all articles. I believe it was understood that after we had done so, we could read them to the jury.

Mr. MAURY: No; it was offered to the Court to see whether the Court would admit it or not. It is agreed that Charles E. White is still on the stand.

Mr. McCARTHY: The paper is in evidence now.

The COURT: Is it the contention that there was a variance between what he read and what he said?

Mr. McCARTHY: It is not so much what he said; it was what he failed to say in the article.

The COURT: I think that was admitted in evidence was it not?

Mr. MAURY: They are identified. This is a mere tendency to encumber the record.

Mr. JAMESON: This is offered merely for the purpose of showing that there is no charge or sug-



gestion of responsibility on the part of the Northern Pacific for the flood.

Mr. MAURY: That is not a proper way to contradict it in this Court. If he made any inconsistent statement, it should be [132] called to his attention, to the time and place.

The COURT: This is a different matter and it was called to his attention, and he admitted writing it, and that it refers to the matters he testified to on the stand—the flood of June 7, 1929. Well, it may be read to the jury.

Mr. MAURY: What portion do you want read?

Mr. JAMESON: I presume it would be necessary to read all of the article.

The COURT: I thought you gentlemen were going to look it over and find out what it was necessary to read. I can't see the materiality. There is probably a considerable amount of that.

Mr. JAMESON: That is true, if the Court please.

The COURT: Then why should you read it all, if it isn't necessary?

Mr. McCARTHY: We are willing to let the paper go in on the theory——

The COURT: Let the jury consider it, if they want to.

Mr. McCARTHY: All right; that is all we want.

Mr. JAMESON: We offer defendant's exhibit "B" in evidence.

Mr. MAURY: We object to it as entirely immaterial and not tending to prove anything at all,

and a mere encumbrance of the record about immaterial stuff,—not material to the case.

The COURT: The Court will allow the exhibits to go to the jury for examination.

Mr. MAURY: I was thinking that whatever is in, should be read.

The COURT: They will have the exhibit for examination.

Mr. MAURY: Will your Honor note our exception to the admission of those newspapers?

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DAN SUTHERLAND,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury). [133]

I have lived in Wibaux about 33 years,—since 1901. I recall the old Northern Pacific bridge as it existed around 1900 or 1901 at Wibaux. I recall an old dam that was built about 40 feet north, or downstream, from the bridge.

Q. Tell us what correspondence, if any there was, as you remember it, between the east wing of that dam and the natural bank of the stream that existed there? How did they correspond?—the east bank of the stream and the wing of a concrete dam that existed there?

A. The wing of the concrete dam ran parallel seemingly, with the original bank of the creek,—

(Testimony of Dan Sutherland.)

I should judge right against the bank. The width of the river-banks at the bridge as they first appeared to me when I went to Wibaux, I should judge was about 180 feet.

I recall a flood that took place there in 1921. As to how much of the town was covered by that flood,—all of the town on the south side of the railroad track and west of the creek; and also east to the elevators, and part of the Davis Addition, but I couldn't see that; and all that was left on the west side of town was about one and a half blocks of Main Street, or a little bit,—a block and a half of Main Street that wasn't covered with water. That block and a half that remained above water at that time, I would say that was Main Street from south of the viaduct on Main Street to the Wibaux Machine & Auto business. That is a little bit better than a block and a half of the street; then, going west from Main Street on First Avenue South. There was an island left around in this portion of town in 1921 (indicating), that was not under water.

Q. In the answer of the railroad here, a cement wall is spoken of. Who built that wall? \* Do you remember helping build a concrete or cement wall near Kinney's house?

A. Yes, sir. That was built about 1909 or 1910, I think. I may be off a year or two, but somewhere around there. That wall was built for protection from water there,—from water backing up, and



(Testimony of Dan Sutherland.)

water from coming over [134] the ground over the slough there. The water would start backing up from the bridge on the Northern Pacific Railway track down on Beaver Creek. I have seen that water back up from the railroad fill about seven times that I remember of, well; the first year was 1903, then 1906, 1909, 1912, that was caused from a break up of the ice in the spring; 1916, 1921 and 1929. Describing how that water would act when it backed up in those years,—of the times previous to 1921,—the opening at the bridge didn't seem to be large enough to take care of the water when we had a very heavy rain, and when it got to the bridge, it started damming up, and as it dammed up, it would run west towards the depot along parallel to the railroad track along the right-of-way; also, it would go east and southeast towards the elevators what you see there, and then turn south again over the county road (it is No. 10 road now), and up back towards the Mattie Miller house—the green house. The Mattie Miller house has been called the “green house”; that is it there. I have seen it, before 1921, back up from the fill to the Mattie Miller house, or beyond the Mattie Miller house, about two or three times that I have noticed myself, that it backed up there.

I was in Wibaux at the time when the viaduct was first cut under the railroad fill; I am not speaking about the concrete viaduct that is there now, but the first time that an entrance-way for teams or people was made under the railroad, in the railroad fill,—I remember when it was cut out; I don't

(Testimony of Dan Sutherland.)

remember exactly the year though. I think it was 1911 or 1912, I am not sure. It had wooden posts in it. The old wooden-post viaduct remained there until I think, 1929 or 1930, when they put in the new viaduct,—until after the flood of June 7, 1929.

I recall a visit of Mr. Rapelje to Wibaux. I knew Mr. Rapelje for quite a number of years previous to that time; I first met him in Glendive, Montana. After that, when I happened to be around [135] Glendive, I would usually meet him possibly once or twice a year. I don't know what position Mr. Rapelje held on the occasion of that visit to Wibaux,—the superintendent I think he was then, I could not be sure; superintendent of the Northern Pacific; I could not tell whether he was division superintendent or general. I never did know what Mr. Rapelje's first name was; just "Mr. Rapelje"; I was introduced to him as "Mr. Rapelje". The meeting took place I think, in 1921, and I was present there through Mr. Cullen as Mayor, advised a bunch of us that he was going through Wibaux and wanted to meet with a bunch of the business people in Wibaux to discuss some things that were wanted there in Wibaux. To start with, there was four or five of the citizens who met the superintendent, I should imagine. Before it was finished up, there must have been ten or twelve citizens there. Of the railroad officials present on behalf of the railroad company, so far as I remember, the only one I knew was Mr. Rapelje. There was supposed to be an engineer there, and some other parties, but I didn't



(Testimony of Dan Sutherland.)

know who they were. I could not tell you whether that engineer was Mr. Blum or Mr. Sloan, or who it was; I never paid any attention to them at the time. As to what conversation took place between Mr. Rapelje and other persons from Wibaux that met him,—the conversation started about an underpass or viaduct for the school children to go to school, to save them from going over the railroad tracks. That (indicating), was the underpass that was talked about at the time. That did not exist on that day—not at that time. That was talked about, and I understood the engineer, Mr. Fisher and Mr. Charles Dahl went up to find out where they wanted to put that viaduct. Mr. Rapelje stayed down with us and he went down with us to look at some piling underneath the viaduct that had been seemingly damaged, and after he looked the piling over,—anyway, it was taken up about us getting a new bridge over Beaver Creek, and he said that at that time there were plans in St. Paul, [136] were to raise the railroad track—I don't remember, it was five or eight feet—and that they wouldn't do nothing with that until they raised it, and when they did, they would give us a new bridge over Beaver Creek—a longer bridge—and also a new viaduct under Main Street. Joe D. Cullen was there at that time and when that conversation took place. There was never any new viaduct made there according to Mr. Rapelje's promise, before the flood of June 7, 1929. There was never any longer bridge made there before the flood of June 7, 1929.



(Testimony of Dan Sutherland.)

Q. What was the length, as near as you can recall, of the bridge there—the railroad bridge—from the time you went to Wibaux until the flood of June 7, 1929?

A. When I went to Wibaux first, there was an approach on each side of the bridge. By an “approach”, I mean there was an opening there between the piers of the bridge and the embankment. That opening on each side, as near as I recall, about a year or something after I went there—a year or two years—it was filled in with dirt and a very little riprapping done on it—not much—about four or five feet down on the bottom. It was filled in on those approaches from the base of the piers clear up to the top of the grade, on a slant. The filling in which I am speaking of on the 20-foot approaches, on each side, is correctly represented on plaintiff’s exhibit 4,—it is from this side here. This side don’t show,—yes it does too; it is the same thing; that is how it was filled in. It remained in that condition up until 1929.

On June 7, 1929, I got up about 5:00 in the morning. At that time, I was living on the north side of the track. About 6:00 o’clock in the morning, I got over or through the viaduct, or some way, to the south side of the track. Beaver Creek was pretty high at about 6:00 o’clock in the morning. By “pretty high”,—giving you something more definite,—it was starting to back the water from the bridge along the railroad track west towards the [137] depot. The flats southeast towards the eleva-

(Testimony of Dan Sutherland.)

tors was covered with water at that time too. As to the condition of Main Street in front of the plaintiff Nick Wagner's property,—I know where that was—at the time that I first saw it that morning, and when the water was coming along the fill to the depot as I described, there was no water on Main Street at that time; no water anywhere on Main Street.

I was in the oil business. That is the place right there. You are pointing to it,—on the railroad right-of-way, south and west of the viaduct,—north of Orgain Avenue and west of Wibaux Street. It was somewhere near 7:00 o'clock that morning when the water first come to that building; it come from the east. When the water got to that building from the east, Main Street, by the Wagner property was still dry. As to how long it remained dry after that water started coming from the east and got to my place of business, it was a little after 7:00 o'clock; I couldn't say; I never looked at no time that day. The part of Main Street that was covered with water first that morning was right across from the Fullerton Lumber Company, (that was the Dunham Lumber Company at that time), that was the first part filled up over towards between that and my place the water was coming from the east and coming around the building there,—both sides of the building,—between the lumber building and the depot and between the lumber building and the Orgain building. The depth as it came around there, as it



(Testimony of Dan Sutherland.)

appeared to be when I first saw it,—well, it naturally kept raising, and I should judge the longer it went, the deeper it got. The first water came around between the lumber yard and the right-of-way—that dropped through the viaduct, and when it started raising and over on the other side, it was coming across Main Street and by my place of business and down what you call to the slough and parallel with the railroad track, going west. It was sometime right after 7:00 or 7:00 o'clock sometime, [138] when I first noticed water coming from the west towards my place that morning; the both waters met at the west end of the slough. When they met, as to the condition of Wibaux Street near the plaintiff's property,—I started to go through with my car when the water met and when I came back, it was still dry on Main Street. I parked my car right across from my building in front of the Albert Pickering place on this corner (indicating); I faced my car south against the curb. It would be a little after 7:00 o'clock I should judge, or about 7:00, when I first saw water in the part of Main Street near Nick Wagner's property.

Q. Could you tell from whence that water came?

A. No, I could not say. I think it came first from down from the slough.

Mr. McCARTHY: Well, we object to what he thinks.

Q. Strike it out. Could you tell whence the water that was coming from the west to your business place came—where that come from?



(Testimony of Dan Sutherland.)

A. That came from the water tank down through what they call the slough, and it come down alongside the railroad track towards the viaduct. I could observe the little elevation here towards the Pierre Wibaux monument; there was no water coming from there. As to how long it had been since it had rained in Wibaux when I got up, there was no rain when I got up; when I got up at 5:00, the streets were wet, showing it had been raining in the night-time, but there was no rain when I got up.

When the waters commenced to rise, I went into the Albert Pickering pool hall on the corner. I couldn't tell how long I remained there—possibly an hour or so; less than an hour. The water had raised slowly. I think the crest of the water was close to about 10:00 o'clock. A little previous to that, there was a recession—the water had gone down six or eight inches, or nine inches maybe, more or less. It stayed down for a little while and it started to come back, and came back again until it [139] came to the high point. From the water mark that I saw afterwards in my place of business, the high point that it raised to, I think on the floor of the warehouse was about eight foot two inches. I pointed out that mark to Mr. Oien, the engineer for the Northern Pacific Railway Company. After this flood, I don't remember whether he came around and asked for the information, but we was talking it over and I pointed it out; whether he asked for it, I don't remember. He made notes. I didn't point

(Testimony of Dan Sutherland.)

out any other water marks to him or to Lyman that I remember of. I pointed out correctly and truthfully to Mr. Oien what the water mark was in my place of business on June 7th.

I left the pool hall that morning. We were in the pool hall and a pool table there tipped over,—kind of tipped over on its side, and we was afraid the foundation had gone from the building and in place of that, it was the floor heaved; we didn't know that, but that was the reason we left. I went west to the Milton Hotel. That is the Milton Hotel you got your marker on right now—the fourth house from Wibaux Street, on Orgain Avenue and fronting towards the railroad fill. When I left the pool hall here, the water was coming up to about my waist here. I recall an incident of how we got through the front door. The door opened in and when we tried the door, we couldn't open it. The glass front in the door was much the same as this here, only a little higher up. It was jammed and I couldn't open it. We kicked our way out—kicked the glass out and went out. At that time, the water came to here (indicating waist) on me; that was between 8:00 and 8:30 o'clock.

The water raised slowly afterwards; I couldn't say how much it did raise after that. With reference to my automobile that I parked in the street there, it raised until just the top of the automobile was out of the water. I had an oil tank there and the hind end was floating around in the water.

(Testimony of Dan Sutherland.)

Q. Do you know where that tank lit finally? Came to earth again,— [140] the oil tank?

A. You are referring to my oil tank or Charlie Decker's? I saw Charlie Decker's oil tank floating around. It started from the south side of the Charlie Decker building on First Street, right down there; here is Charlie Decker's place here, north of my place here; his place is north of First Avenue South and west of E Street on the profile. That oil tank landed in here; I am pointing to the front of the Catholic rectory. It landed about 20 or 30 feet from the railroad fill, I should think. It remained there until after the flood,—I couldn't tell you how long afterwards. I recall where the Odd Fellows' building was; it was alongside of the Charlie Decker building. (That is the Charlie Decker building), on the west side. That appears to be the hall. It isn't still standing there; it was moved out of there the day of the flood. That building was moved to that place. Then on the day of the flood, it raised off of the foundation and it went a little north and turned right around—the south end turned north and hung up on a cedar post and that held it there until the water went down. As to how far it moved from its original position,—the lots are 50 feet long, and the south end of the building that turned around was practically on the line with the north end of the lots, right on the west side of the lot that the hall was on.

In 1921 the water came right through my feed barn and also blacksmith shop I had rented. My



(Testimony of Dan Sutherland.)

feed barn was right south of the Woodmen's Hall in that vacant space. You are now pointing to the Charlie Decker place. The place right south of the Charlie Decker place is the same building I had rented out to another party, and the barn here on the lots to the west side of that, there was feed lots between that and where the barn was. There is no building there now, not on the profile. In 1921, as to the depth that the water got in there, it was going through my barn about, pretty near just about up to my knees. [141]

### Cross Examination

(By Mr. McCarthy).

I am a plaintiff in one of these suits against the railway company, that I claim damage as the result of this flood.

Q. By the way, Mr. White and Mr. Drake, who were on the stand, are also plaintiffs?

Mr. MAURY: Objected to. The best evidence is the record, if you want an admission why they are.

My oil station—the ground across the street there at my oil station, the floor of the warehouse of the oil station would be lower than the Pickering pool hall.

Q. The southerly side of Orgain Avenue at Main Street, is higher than when you get down to where your oil station is and on the right-of-way of the railway?

(Testimony of Dan Sutherland.)

A. The south side of the building and the office, I think, ought to be about the same level, I think, as the Pickering pool hall place. It slopes down; there is no floor in the warehouse, so that would be lower; the ground slopes down after you get across Orgain Street.

Q. Yes. Let's take it this way: Up here on Wibaux or Main Street, in the center of the street,—now, let us take a point opposite the rear of the Pickering pool hall. Now, compare this ground,—this point—with the ground over here where your oil station was, taking the street,—the street is going down grade?

A. There is quite a drop from the north side of the street to the viaduct. I could not exactly tell you what that grade or slope is in there. Your measurements will show you exactly what that is Mr. McCarthy. It is lower here than it is to the south of Orgain Avenue, and that would create an appearance there of the water being higher up on Wibaux Street than it would down towards the viaduct.

I got up on top of the Milton Hotel and I could see to the south of the town.

Q. And the whole valley was full of water? [142]

Mr. MAURY: We must object. The valley was 65 miles long.

The COURT: Put some limits.

Q. As far as you could see?

Mr. MAURY: Objected to as indefinite, because the jury couldn't tell how far he could see.

(Testimony of Dan Sutherland.)

Q. What is the fact Mr. Sutherland?

A. South of the town, I couldn't say how far,—but there was water there. I wouldn't want to say how far I could see to the south; I might see a mile or two miles. I think inside of two miles,—less than that; one to two miles would be all you could observe. It looked like a great wide river there; there was a lot of water there; and this water was flowing from the south towards the north, and towards Wibaux,—it always flows that way. This 1929 high water was beyond anything I had ever seen in the way of a flood there in Wibaux in 33 years.

In regard to this Rapelje meeting that I talked about,—I was not an official; I was not the mayor or acting mayor, nor an alderman at that time. I was down there just as one of the members of the Commercial Club.

Q. Mr. Rapelje got off the train and talked with you men there?

A. He did.

Q. You were just listening in? You didn't have any conversation yourself with Rapelje, did you Mr. Sutherland?

A. Not farther than meeting him there. When I met him, I said "How do you do, Mr. Rapelje," and that was about the extent of any talk I had myself.

Q. What conversation took place with Mr. Rapelje was with others than you?



(Testimony of Dan Sutherland.)

A. The conversation that I expressed to you here. He was talking to Mr. Cullen, the mayor, or anyone that asked him any questions. I don't remember that I asked him any questions. But I remember the first thing that was brought up was [143] "Would the railway company do something so that the school children could get over across the railway to school without the necessity of going over the railway track", and that request was complied with by the railway company; right after that, the underpass was put in, as he promised us. Then, there was a complaint about the bridge over Main Street or Wibaux Street,—there was some claim that it was muddy down underneath there. There was some talk about that at that time too, and some complaint about the center pier. Mr. Rapelje explained the difficulty of doing any work in that connection.

Q. Now, when you came to talk about the bridge over Beaver Creek, Mr. Sutherland, isn't it a fact that all Mr. Rapelje said was that they would some day, widen that bridge or raise it?

A. Lengthen it and raising it.

Q. Was the word "lengthen" used there by Mr. Rapelje?

A. The meaning of the word was——

Q. Take the questions one at a time, Mr. Sutherland. Did Mr. Rapelje say that the railway company would lengthen the bridge over Beaver Creek? Yes, or no?

(Testimony of Dan Sutherland.)

A. He was asked the question when he was going to give us a longer bridge,—that we needed a longer bridge over Beaver Creek—and he gave the answer that that would not be done until they raised the track.

I was a witness in the case of Heckaman vs. The Northern Pacific, tried in the State District Court here in Montana, in Fallon County.

Q. I will ask you to read the indicated part there on page 371 first, and another part later that I will call your attention to.

A. Yes, sir (witness reading).

Q. Now, I call your attention to the bottom of page 373 and top of 374.

(Witness reading)

A. That is correct.

Q. Mr. Sutherland, the meeting with Mr. Rapelje took place where? [144] Where was this talk had, near the depot?

A. Underneath the viaduct, after he looked at the piers. I think it was after he looked at the piers underneath the viaduct. Mr. Rapelje and the other gentlemen were standing on Wibaux or Main Street down underneath the viaduct; they examined those piers—the viaduct.

Q. Mr. Sutherland, having refreshed your recollection by having looked at your previous testimony, do you want to still say that Mr. Rapelje mentioned anything about lengthening the bridge?

A. He was asked about the lengthening, and I have answered it that way, but the meaning was that

(Testimony of Dan Sutherland.)

he was going to give us the longer bridge. I have answered it "wider bridge" to you.

Q. Didn't you testify in the Heckaman case at Baker, Montana, in the State District Court, in Fallon County, substantially, as follows: "And he told us," (he, referring to Rapelje), "'This viaduct for the children we will give you that immediately, but this bridge here, we won't do nothing at the present time as to the bridge over the creek, because we expect to raise this track, and that we expect in the near future, then we will give you a full-width bridge here, and we will raise the other bridge and give you a bridge there.''" Is that what he said?

A. Yes, sir.

Q. Now, was this question asked you and wasn't this answer given in the same Heckaman trial? "Question: Also, at that time, you say he said something about the bridge No. 184 over Beaver Creek? Answer: He didn't mention no length, but they were going to 'widen it when the track was raised'—the bridge over Beaver Creek. Question: Widen it for double-track? Answer: No; he didn't say, but we took it for granted he meant length-wise." Was that testimony given? (No ans.).



NICK WAGNER,

being first duly sworn as a witness in his own behalf as plaintiff, testified: [145]

Direct Examination

(By Mr. Maury).

My name is Nick Wagner. I have lived in Wibaux 24 years, going on 25 the 5th day of March.

Q. Where was your place of business on June 7, 1929?

A. This "business" is something new to me; you know where it is. I am a native of Luxemburg; I speak Luxemburg.

Q. Listen very careful now. I know it is hard for you to understand me. I can't always understand you; I don't speak Luxemburg. Was your place of business on June 7, 1929, right here at Wibaux Street and First Avenue South?

A. Yes.

Q. Where did you sleep that night that the flood came, Nick?

A. I was in the store that night. I woke up the next morning somewheres about half past 6:00—somewheres around there. As to what I did when I woke up, we had some stuff underneath the table and I tried to get it to the top of the table and counters. I don't know what was outside of my place of business when I got up; I got busy in the store. As to what was in the basement when I got up,—I hear the window come, kind of noise. I went down to see, but I couldn't; there was too much

(Testimony of Nick Wagner.)

water there. Then I started working, fixing up the stuff in the store so to get it up from getting wet. I was trying to raise the stuff up higher from the floor, you know. Then the water came in—not to the top—but it came in the basement; I hear it and see it. Later, I tried to open up that front door that morning; about 7:30 somebody tried to get me out of there. That morning, my merchandise—clothes, trousers, shirts and everything—wet; it got pretty wet. The shelves tipped over after the water got high, you know. Every kind of stuff came in on them, you know,—mud, and I don't know,—pretty dirty stuff. When the flood went away, everything inside there looked bad, everything dirty, tables tipped over and shelves tipped over, and finally, I had to climb up on top of it. [146] I climbed up on top of it all because it was too wet down there; it got too high for me.

The COURT: Mr. Maury, you will have to repeat what he says.

Mr. MAURY: Yes; I will try.

I climbed up on top of it, because the water got too high for me—you bet.

Mr. MAURY: I will have to ask permission to ask leading questions, because it is one of the cases as far as the physical happenings are concerned.

The COURT: I am satisfied some of those jurors didn't hear a word of it, hardly. Repeat his answer.

I opened the front door that morning. I couldn't shut it again—"not so easy". It stayed open for

(Testimony of Nick Wagner.)

awhile; I couldn't shut it. All of the shelving fell down. As to what happened to the high clothing as well as that that was down,—all went down, every bit of it. The clothing in the shelves was about 10½ inches to 2 foot above the floor. There was none of my stuff on the floor; it was up on the shelves, and the lowest shelf was 10½ inches to 12 inches high above the floor.

After that flood, my clothing and my shirts and my other property smelled strong—smelled pretty strong, I tell you.

Q. How were they as to being soaked with silt?

A. I didn't have much luck with them. I tried to sell them,—you bet you. Such articles as I sold, the most of them "come back". They come back because they didn't want them.

Q. Nick, how much stock did you have in that store before that flood?

A. Before the flood——

Mr. HALL: We object to that on the ground that his inventories, or his record, is the best evidence of what he had, if he had any such record.

The COURT: I expect so. He ought to have some books. [147]

Mr. MAURY: We have the book. The original invoices we claim are lost through the entire fault of the defendant. There was a pile of mud and all records in Wibaux that got in that mud—even the First National Bank records—were hauled out to the dump.



(Testimony of Nick Wagner.)

The COURT: Never mind about that.

I haven't got any invoices,—everything mud; I couldn't see nothing. Soon after this flood, me and my daughter Olivia, tried to figure out what I had there. We had to send some stuff away to get dry-cleaned, you know. Some of it come back you know. We took it away, you know, but some of it come just back you know—not altogether. Olivia made this book that you are showing me. That is in her handwriting; she wrote every bit of it. After the flood she started making this; I don't think anything done before the 7th day of July, then she started making it, I think,—somewheres around there. I tried to put down here, or tell Olivia to put down all my merchandise and goods that I had there. As far as I know, I told her correctly at that time, as near as I could, and it was correct. I gave her the values of the clothing and everything,—the articles that I had and that I told her to put down; I give her the amount that I pay for the goods. It wasn't retail, but wholesale prices that I was putting down here; I didn't put any retail here. So far as I know, I spent \$2200.00 trying to get the clothes cleaned up. I couldn't sell them after they were cleaned up; it didn't do much good. The value of the goods at wholesale, that I had in there before that flood, that is supposed to be around \$30,000.00. It consisted of suits, overcoats, shirts, underwear, mackinaws,—all kinds of stuff you know,—all kinds underclothing and socks.

(Testimony of Nick Wagner.)

Q. And how about shelving Nick,—fixtures?

Mr. HALL: We object to anything about shelving; there is no allegation about shelving. [148]

Mr. MAURY: When was that deposition taken Mr. Colton? We ask leave to amend and state that the defendant has had notice of this since November 21, 1933, as to what the losses were, from a deposition that was taken at that time from Nick Wagner himself.

Mr. HALL: We object to amending their complaint at this time, nearly five years after the alleged damage. The complaint was filed January 29, 1931,—nearly two years after the damage and attempting to amend at this time, and they certainly knew what their goods were and what their damage was, two years afterwards if they know five years afterwards. We object to any amendment at this time as to the amount of damage on account of laches; and they are not entitled to it.

The COURT: Was that deposition taken with some counsel present, or a member of the staff of counsel?

Mr. MAURY: Mr. E. M. Hall was present November 21, 1933.

Mr. HALL: We appeared there. Counsel served notice. We appeared there and they gave that deposition.

The COURT: Was there any objection made at that time to the testimony along that line,—in reference to fixtures?

(Testimony of Nick Wagner.)

Mr. HALL: Yes; we objected there and had counsel make a statement there that they were making no claim for fixtures.

The COURT: That they were making no claim for fixtures?

Mr. MAURY: We, at this time, ask to amend as to the value of the merchandise to \$28,000.00 instead of \$18,000.00.

(Jury excused. Argued by counsel)

Mr. HALL: They come in here and file a complaint in a year and three-quarters in which they allege the value [149] of the stock was \$18,000.00 and they claim \$15,000.00. Then they go on more than four years afterwards and claim damage of \$26,000.00 and made no attempt to amend; the rule of laches comes in here—all that time.

The COURT: Just a minute. When was this complaint filed?

Mr. HALL: January 29, 1931.

The COURT: When was the deposition taken?

Mr. HALL: November 21, 1933.

The COURT: Not so very much time has elapsed as to the taking of that deposition. You were present and were aware what they claimed and showing the same inventory practically, was presented at the time the deposition was taken.

Mr. MAURY: This cause is sui generis.

Mr. HALL: We say that he cannot recover more at this time and should not be permitted to amend his complaint when he come in a year and a half



(Testimony of Nick Wagner.)

after the flood and swore his total merchandise was \$18,000.00. He knew it then as well as he does now; he had that in his possession at that time. Now, he goes on down to last November and comes in and introduces a record that he sold some \$13,000.00 worth of stock; and now, to keep his damage up, he claims he had \$26,000.00 damage at that time. He knew it in 1931, because that inventory was taken in 1929,—July 7th. Now, he didn't ask leave to amend at that time. \* \* \* \*

The COURT: He swore to it after you had taken an inventory and appraisalment, which you propose to introduce?

Mr. MAURY: Yes, sir.

The COURT: Now, you ask to amend. I don't believe I will allow that amendment.

Mr. MAURY: Exception. [150]

The COURT: Well, I think I will deny the application to amend in both instances. Very well. Call in the jury.

This list is a correct list of my stuff,—merchandise, and a correct statement of the values, and nothing else,—absolutely; absolutely correct, and all the values, you bet.

Mr. MAURY: We offer it in evidence.

Mr. HALL: Oh, I will not object to that going in evidence there. That is, object to it as not to show that they are entitled to any more damages than they are asking for in their complaint; and we object to it if it is offered for any purpose of

(Testimony of Nick Wagner.)

amending their claim for damages. And upon the further ground that the complaint in this case shows that the plaintiff swore to and signed the complaint, which he alleged at that time that his stock of merchandise was \$18,000.00, which complaint was sworn to on January 29, 1931, and he now comes in and seeks to offer an inventory in which he claims that the stock of goods is \$26,000.00.

Mr. MAURY: That is all for argument to the jury. I couldn't understand Nick on his figures then any better than I can now,—when I drew the complaint.

(Mr. Maury reading): “July 7, 1929, Inventory; lot number; size, price, total;” Just going fast over these to show the kind of stuff he had gentlemen. (reading from page 1) They total on that page \$1851.50; another page (page 2) \$1867.00; (page 3), suits and clothes listed, totaling \$1356.00 on that page; turning to page 4, suits listed \$1374.00; men's suits on page 5, \$1278.00; on page 6, \$1159.00; boys' suits, entire page 7, \$711.00; page 8, \$319.00; page 9, boys' overcoats \$506.50; page 10, men's overcoats \$1273.50; page 11, \$273.00 and \$741.50; on page 12, \$294.00; page 13, \$400.00; page 14, \$153.00, \$198.00; page 15, [151] \$435.20; page 16, \$166.84; page 17, \$21.60, \$274.94; page 18, \$222.00, total of \$300.00, bottom of page 18; page 19, total \$134.25; page 20, \$73.95; page 21, \$678.25; page 22——

(Q. What is Spaide? A. That is the name of some shirts.)

We find shirts, and Spaide shirts, \$656.80.

(Testimony of Nick Wagner.)

(Q. I find the word "Suede" here. What is that? Stuff they wear now? A. Sure; they look like leather, but they are not,—kind of moleskin.)

Page 23, \$832.00; page 24, \$574.50; men's work shirts, \$398.79; page 26, \$125.81, \$63.00; page 27, \$60.00, \$697.65, \$217.30; page 28, caps, \$140.20; "PJ", 2-piece, men's pajamas, \$177.50, \$311.85; page 29, \$522.28; page 30, \$116.00, \$111.30, \$103.30;

(Q. What are "Black Fireman Engineer?" A. That is name of them—kind of work socks; "Corodovan", that is good socks).  
\$385.59.

(Q. What is Munsing wear? A. Underwear. Stephenson make just as good; Munsing wear is good; you can't beat it—silk and cotton and wool too; Stephenson, that is good—just as good as the Munsing—we think so.)

\$1602.25; page 33, \$1797.94; page 34, \$277.00, \$61.50, \$36.37; page 35, \$424.50, \$31.25, \$17.40; page 36, shoe laces \$71.82. The total of the merchandise \$25,976.43. I have not read the fixtures.

Q. Nick, what was all of your stuff worth after that flood? How much could you sell it for?

A. I sold it sometimes for something, but it would come back—most of it come back.

Q. How much would you say it was worth, Nick? What would anybody have bought—any other merchant walking in there looking for it—what could you have gotten for it? I say, what would anybody have given you for it?



(Testimony of Nick Wagner.)

A. They would give me more than I had coming, but you couldn't——

Mr. MAURY: Is your daughter here?

A. Yes; you bet you. [152]

Q. (Speaking to Miss Olivia Wagner): I want to find out what any wholesale man, or drummer, coming into that place the day after that flood would have given him in money, for that stuff?

Mr. HALL: We object to that as calling for a conclusion,—this witness trying to testify what some drummer might have come in there and offered, we think is too vague and uncertain. If he had some offer or something definite, but simply to say what some drummer might have come in and offered. He asked what some drummer might have paid for it.

Q. Now, Miss Olivia, you ask him what his stuff was worth in the market the day after that flood?

OLIVIA WAGNER: What would you have sold it for?

A. I would have asked him too much.

Q. The day after the flood, could you have gotten for all that muddy stuff \$1000.00?

A. Well, we had good stuff, yes, you bet you.

The COURT: What does he say it is worth? If he doesn't know, let him say so.

Q. What could you have sold it for?

A. \$1000.00.

Q. Could you have gotten \$1000.00?

A. I don't know.

(Testimony of Nick Wagner.)

Mr. HALL: I move to strike the answer out; he hasn't shown that anybody offered him that.

The COURT: As near as I can make out, he could have sold it for \$1000.00; presumably, he considered he could have sold it for \$1000.00. We will let the answer stand for what it is worth.

Q. How much was it worth the day before the flood?

A. I would have to have \$30,000.00 for it. Nothing has been paid me by anybody for this loss.

Cross Examination:

(By Mr. Hall).

Q. You never filed any claim against the railway company for [153] damages before the time that you filed your complaint did you?

A. Yes. That is the first time. The first time the railway company knew I was going to sue them was when I employed counsel and filed my complaint.

Q. You signed that complaint? That is your signature?

A. Who got that?

Q. You wrote that (showing papers to witness)?

Mr. MAURY: That is a copy.

Mr. COLTON: I signed as Notary Public; that is my signature there on the copy.

Mr. HALL: You took his acknowledgment to the original?

Mr. COLTON: Yes, I did.

Mr. HALL: Did he sign and swear to it, according to your certificate?

(Testimony of Nick Wagner.)

Mr. MAURY: We object to that as not the best evidence.

Mr. HALL: Mr. Colton has made his verification there as Notary Public.

Mr. MAURY: If you want us to admit that that is an exact copy of the original complaint, we do so freely. But as to testing Nick as to his signature, that is not his signature.

Mr. COLTON: We will admit it is a correct copy.

The COURT: You can interrogate this witness along that line, and Mr. Colton too, if you want to.

When I brought the suit, I went in and signed a complaint, and swore to it before Mr. Colton. In that complaint I did not say that my stock of merchandise was worth \$18,000.00. I didn't say that.

Q. Didn't you make a report to Bradstreet & Dun in September, 1928, that you had a stock of merchandise at that time of \$15,000.00, when Mr. Larson—you know what Bradstreet & Dun is?

A. Yes. [154]

Q. But you made reports?

A. No, no.

Mr. MAURY: We object to that as too remote—what he did the year before. And it isn't shown whether he was stocking up, or was stocking up for spring, six months before.

The COURT: What do you propose to do?

Mr. HALL: I think he made a report that year and another one the next year, and then followed that up with the same amount of stock.

(Adjourned until 9:30 A. M., March 28, 1934.)



(Testimony of Nick Wagner.)

(By Mr. Hall, continuing):

Q. Mr. Wagner, you made reports to Bradstreet & Dun?

A. In the last 15 years.

Q. Didn't a representative of Bradstreet & Dun call on you about September 29th, 1928, and at that time you made him a report——

A. I did not.

Mr. MAURY: I move to segregate; there are two questions.

The COURT: Yes.

A representative of Bradstreet & Dun may call in September, 1928, I don't know. I did not make a report; didn't make any report at that time. I couldn't tell you whether he called on me October 5, 1929, I don't know. I did not make any report then.

I carried about the same stock of goods from year to year, for several years. I had something like the same stock in 1928 that I had in 1929, at the time of the flood.

Q. And you made out an assessment list for the year 1929, for the stock you had on the first Monday of March, 1929?

A. I left it to Mr. Howard, the assessor. I swore to it before Mr. Howard; I made the affidavit before Mr. Howard; that was Mr. W. C. Howard; he was the county assessor.

Q. And in that assessment list, Mr. Wagner, did you not make a return of your merchandise at \$1300.00? [155]

(Testimony of Nick Wagner.)

Mr. MAURY: The assessment list is the best evidence.

The COURT: Very well; present it.

(Marked Defendant's exhibit D-4)

Q. And in that assessment list, the fixtures was assessed at \$250.00?

A. I never looked at it.

Mr. HALL: We offer this (D-4) in evidence.

Mr. MAURY: No objection.

The COURT: It may be received. (Exhibit read to jury.)

I was supposed to be the owner of that stock of goods. I was the owner; they were my goods. While that was made out in the name of Olivia Wagner,—well, I don't know whether they were my goods; I signed it over.

Q. Well, you testified they were your goods?

A. Well, I don't know.

On July 7, 1929,—that was about a month after the flood—I took a list of my goods in the store there. My daughter wrote it down in this book (plaintiff's P-3),—I didn't take that all on July 7th—the stuff came back. But I started on July 7th. On July 7th I got all the dirt pretty well cleaned out then. I sent some of my suits to Miles City to be cleaned, and some cleaned down home; and some of them sent out in the country to be cleaned. In taking this inventory, I had to go around and handle and examine each suit of clothes,—and each hat—and made a list of it. My daughter went around

(Testimony of Nick Wagner.)

with me and she handled the clothes too, and when I would find some piece of clothes, she would put it down in the book; she would carry this book and write it down. I don't know,—maybe three weeks, maybe a month, making this inventory—maybe every day and some nights. I used this book right along taking that inventory—maybe not this book here—but we had scratch book to put it down at the same time and then we put it in here. The flood didn't open the doors; the door wasn't open in my store; I kept the doors closed.

Q. The water simply seeped under the cracks and kept raising until [156] it got five feet high?

A. It didn't get five feet high,—51 inches.

Q. But it didn't wash in the door at the front or the door at the rear?

A. I opened that door myself.

Q. You opened that while the flood was coming in or afterwards?

A. No; before. During the time the water was coming in the building, the door was closed. I had some clothes on racks there,—cabinets, with rods there, where I had my suits hanging on. I didn't have any shelves above the racks.

Q. Just about how high were those racks (indicating)?

A. Higher than that.

Q. 7 feet. You could reach up and get a coat off the hook though?

A. Oh, yes, I mean the hat-box. I had my hat-boxes stacked up above the racks. I didn't have



(Testimony of Nick Wagner.)

any clothes on shelves. My building was 25 by 73 feet long. Using the rear end of the courtroom here as the front end of my building, facing on Wibaux Street, there was a stairway that took off about two and a half feet.

The COURT: Your record won't show that.

Mr. McCARTHY: The north side Mr. Hall, is that what you mean?

Q. Yes; the building was facing Wibaux Street on the west?

A. Yes. And on the north side of the building there was a stairway that took off,—two and a half feet of the stairway for a distance back somewhere about 20 feet, and on the southwest corner of the building there was another door came in at the rear, and I had a recess there—that door set back in 10 or 12 feet, that took off 10 or 12 feet of the wall-space there, something like that. Then, I had across the rear of the building, at the east end, a little room partitioned off there, that was five or five and a half feet wide, maybe.

Q. Now, you had your racks beginning where that stairway stopped on the north wall, back to this little partition at the rear? \* The racks where you had your clothes?

A. The casings—they was [157] against the wall from the point where the stairway stopped down to this partition. We had racks hanging up, just hooks in the wall. On the south side, I had casings along that wall, the casings they were wooden cab-

(Testimony of Nick Wagner.)

inets. The depth that they stood out from the wall was something like that—about where your foot is,—two and a half feet. They were wide enough for a coat to hang on a rod in the middle—and the shoulders,—two and a half feet. I had the cabinets made; they had a base; they sat on the floor, and the clothes I had in there hung on this rod in the center of the cabinet. I had my mackinaws and leather jackets on this part here,—on this partition (pointing to the north wall); I had rods all over besides the casing. I had to hang them up this way—just the same as the casing. As to where I kept my socks, neck-ties and things of that kind, I had showcases; these show-cases were in front. I had tables—common tables—ordinary tables standing up like that; the height of the tables was about like that (indicating reporter's table). In the basement was Mr. White's printing plant. I didn't have any stuff in there. All this stock was in one room. The water tipped over all these cabinets, casings; and tipped over the tables—they went first. I don't know whether all the clothes were completely covered with water; the cabinets was pretty well loaded with suits. They tipped over.

Q. When they tipped over, were they all covered with water?

A. Oh, no, some part of them was hanging in there.

Q. I understood you to say all those cabinets tipped over on the floor?

(Testimony of Nick Wagner.)

A. You know they can't get down on the floor; there was quite a few in there.

Q. One fell over on this side and another fell over on this side, on top of each other?

A. They was there. All the clothes got wet. I wouldn't say that they all got wet from that flood. I would say something like 75% of them maybe were completely soaked. [158]

I took an inventory the first of each year. That was destroyed in the flood. I had a safe and a desk too. I don't know now whether I kept my inventories in the safe. The water got in the safe. The water so obliterated the figures on my inventories so I couldn't read it. I testified this was the wholesale price of the suits. As to how I got that information after the flood,—just as soon as I get the goods in I put the wholesale price on the coat ticket and pants ticket; that was a paper ticket.

Q. After the flood and after you got these clothes back, you could still read these figures?

A. On some of them. I said 75% of them was all wet; I could read that on most of them.

Q. So the water didn't affect that like it did on your inventory?

A. Well, that was more protected there.

On the 21st of November, 1933, my deposition was taken down at Wibaux; I appeared before Mrs. Young and gave my deposition to Mr. Colton and you.



(Testimony of Nick Wagner.)

Q. And after introducing this order book, plaintiff's exhibit P-3, you also at that time, had a type-written list, did you not, which was a copy of all the things that were shown in the inventory, in exhibit P-3?

A. You got to show me now. Here was the inventory written out in my daughter's handwriting. Then Mr. Colton made a typewritten list, in which I testified that that contained all the things that was in this inventory, I guess,—he didn't put each suit there but—I testified, I guess, that that was a correct list of what was in this book here; that is what I testified down there.

Q. Then after that typewritten list was made out showing the coats, suits and everything that was in your inventory, you introduced this. In whose handwriting is that? Was that made out by your daughter too, in pen and ink?

A. I will have—I can't.—

Q. Do you recall you made out a list of what was listed, after the flood, and that was put in this typewritten list?

A. I don't [159] know so much about this, but this one—It is a fact that I had that list put down as to what I sold that for, and what it was worth after it was cleaned and after it got back there; that is the value, and I took this list and put down the values I said the stuff had after it was damaged. That is represented by these figures in pen and ink on that document you have in your hand.

(Testimony of Nick Wagner.)

Q. I have now had this paper I have just been questioning you about marked as defendant's exhibit D-5, and these figures in pen and ink is what you say was the value of the stuff and what you got for it after the damage?

A. What I got for it, I couldn't tell you that; some of it is there yet. Lots of it,—most all, of that stuff had been sold at the time I gave my deposition.

Q. Calling your attention to the deposition I have here, on page 11, it says Mr. Hall asked this question: "At the time you made this list (referring to exhibit D-5) in November, 1933, most of that stuff had been sold" and you answered that "Yes"?

A. Yes.

Q. And over on page 17: "And from the time you made out the first list, which you claim was made in July, 1929, and after the goods were sent to the cleaners and came back, you sold them to whoever would buy them," and you answered that "Yes"?

A. Yes.

Q. "And you didn't keep any record of those sales?" You answered that "No."

A. Yes.

Q. "And you put the money in the till and closed that transaction?"

A. Yes.

Q. "The estimate you made on the goods you got on that list is what you made out a week ago?"

(Testimony of Nick Wagner.)

That is this estimate here—D-5,—and you answered that “Yes”, did you?

A. Yes.

So, I had no record at the time I made out this list in pen and ink on this typewritten sheet (exhibit D-5), as to just what I did sell each article for,—I couldn’t do it.

Q. You put that down from memory?

A. Well, I sent it, and the [160] next day we got it back. I don’t know how much these items are——

Mr. HALL: I have added them up,—\$13,540.87. That is the value of the stuff after it was damaged.

Before I went to Mr. Colton to have him prepare a complaint for this lawsuit, I talked it over with him and told him how much I had been damaged, so I could sign the complaint.

Q. And you told him how much goods you had so he would be able to prepare a complaint?

A. Yes.

Mr. MAURY: Mr. Hall, I am responsible. Don’t put it on to Mr. Colton; it really is my fault.

I talked to both of them; I think it was Mr. Maury mostly.

Q. So, if they made a mistake, they both made a mistake? Now, in your complaint,—calling your attention to the certified copy of the complaint on file there, (and I will say to the Court, we have made arrangements to get the original here), you allege you owned a stock of men’s goods, haberdashery \* \* of the value of more than \$18,000.00,



(Testimony of Nick Wagner.)

and that the flood caught, soaked, carried away \* \* value of the stock to the amount of \$15,000.00." Did you give your attorney that information?

A. No; I don't know nothing about it.

Q. Well, if your stock of goods was \$18,000.00 at that time, and you were damaged \$15,000.00, you figured you had saved out of the wreck about \$15,000.00?

A. That stock was \$28,000.00 when it came back, the stuff cost that much. I doubt if the town of Wibaux had 612 inhabitants; it used to be bigger than that. The complaint alleges we had 612 population there,—I never looked; I didn't know it even had a street-name there.

I said that my daughter and I made out this inventory (P-3), in which we put down the wholesale cost of all my articles.

Q. That added up for the merchandise and stock of that kind, according to my figures, \$26,026.11.

A. That is the stock, without the furniture. And I say that those figures were based [161] upon the wholesale prices that I found on the back of the clothes.

Q. Then where did you get your basis to testify now that that stock was worth \$30,000.00?

A. You can ask me another question.

Q. You testified that this inventory showed that that stock was worth \$26,026.11. I understood you testified yesterday that your stock was worth \$30,000.00. Where did you get that basis?

(Testimony of Nick Wagner.)

A. Ask me another question and I tell you.

Q. How did you figure?

A. You know when you give out stuff, you keep track of it and when it came back, I was over \$2,000.00 short. That means with the fixtures and the stock; we always had the fixtures in. The stock without the fixtures—just the merchandise—comes to \$26,000.00. I testified the merchandise was worth \$30,000.00 with the fixtures.

Q. Oh, that is what you are trying to do?

A. Yes.

Mr. HALL: Now, this exhibit D-5, calling to the attention of the jury,—the witness has testified these items here are a copy of the inventory taken after the flood—— (witness ill) \* \* \* \*

The COURT: What balance is shown due there from that list you were reading to the jury?

Mr. HALL: Well, it showed a balance according to this list here,—if his valuation, as he alleges in his complaint, was \$18,000.00, and if he got \$13,540.00,—what he claims in this last list, it would be the difference between that and \$18,000.00 But yesterday, they sought to amend the complaint and raise the value of the stuff to \$26,000.00 \* \*

Mr. MAURY: Then add \$2200.00 for the cleaning up. \* \* \* We will replace Wagner when he gets all right your Honor.

Mr. HALL: We now offer defendant's D-5 in evidence.

The COURT: It may be received in evidence.

MRS. PATRICK COYNE,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

(By Mr. Maury).

My name is Mrs. Patrick Coyne. I lived in Wibaux on June 7, 1929. I went into the place of business of Nick Wagner after the flood; got there about 1:00 o'clock. I walked through the streets in getting there.

The COURT: Is this the day of the flood Mr. Maury?

Mr. MAURY: The day of the flood—right after.

Describing the condition of the merchandise as I found it in that store of Nick Wagner's right after that flood, when I walked in the store, the show-cases, the tables, the caps, hats, everything were piled, and it was covered with mud, filth; we could hardly walk through the store. We had to walk over the clothes, and it was too heavy,—it was soaked with mud,—it was too heavy for the women that were along with us to lift anything. So we went out and got a few men to help us, and then we saw the condition of the clothes. The clothes was in very bad condition; it was dirty and full of mud, filth of all kinds. In fact, we were very much discouraged.\* We tried to pick some of it up, but it was "glued" to the floor in the mud; the mud was so thick that we almost gave up right away.

Q. How long did you work there for Nick (Wagner) in trying to assort things and pick them up and put them together?



(Testimony of Mrs. Patrick Coyne.)

A. On Friday, after the flood; Saturday, all day; Sunday, Monday, Tuesday, Wednesday and Thursday.

Q. You may describe to the jury the odor of that merchandise?

Mr. HALL: We object to that on the ground that they cannot recover for the odor.

Mr. MAURY: It went to the sale or the value of the merchandise. [163]

The COURT: Yes, somewhat. Overrule the objection.

A. The odor was terrible. When I went home, I had to use lysol to wash myself with,—filth of all kinds; in fact, some of us were sick at times.

I worked there Friday afternoon, after the flood; Saturday, all day; Sunday, Monday, Tuesday, Wednesday and Thursday,—all day. As to whether the merchandise had gotten out of the showcases, or how it corresponded with the positions in which it was in the store before, will say some of the glasses broke in the showcases where the suits were and the overcoats,—some of them, and of course, they washed through, and some of them were just as they were before the flood, but wet, that you couldn't lift them up,—wet, soaked through. I was in that store on Tuesday before the flood; I would frequent that store at least about three times a week. I live just a mile out of Wibaux, across the river from Mr. Massey's, on the west side of the river—about opposite to Mr. Massey's place. I

(Testimony of Mrs. Patrick Coyne.)

didn't see anything in the nature of drygoods, underwear, mackinaws, rubber goods, socks, or anything like that, that escaped that soaking with mud. When I went in, right at the front door, there was a showcase right near the door, and then there was a lot of shirts and underwear and caps and gloves piled right near the door, and we couldn't go around because there was other showcases that had flooded around in the place, so we just had to crawl over them. The piles of mud and stuff in there were, I should judge, about the height of that lamp there (on judge's bench),—because those showcases were quite high. Nick Wagner sold good stuff, very good, goods and merchandise.

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NICK WAGNER,

recalled for re-direct examination, by Mr. Maury, testified:

I answered Mr. Hall that I had not given Dun & Bradstreet [164] a report for 15 years, something like that. I didn't need them. That was because I could get all the credit that I wanted—more than that. The Dun & Bradstreet man came in there about October or the year before the flood, I can't tell you the time. When he came in, I told him "I don't need him." When Bill Howard, the assessor, came in, I told him,—he says, "Nick, I want to assess you." I told him, "All right". I went and

(Testimony of Nick Wagner.)

got the book, I showed him that, and I told him, "Here it is, Bill; make the best you can", and he went out. I didn't read what he made. I signed it,—signed the assessment.

Mr. Colton and I worked on this thing, I don't know how long, before my deposition; I know we worked on it, but I can't tell you whether it was a week or not; can't tell you how long.

Mr. McCARTHY: "This thing" doesn't mean anything.

Mr. MAURY: This defendant's Exhibit D-5 here \* \* \*

I tried to get the valuations the best I could here; they are substantially correct, absolutely.

Q. How much money did you pay out for getting your stock cleaned?

Mr. HALL: Objected to as immaterial under the issues. The complaint merely alleges \$15,000.00—or \$18,000.00 stock of goods, and alleges \$15,000.00. We object to it on the ground that they have not laid any special damages in the way of cleaning up the stock, and under the generality that the goods were damaged to the extent of \$15,000.00 would not include special items such as cleaning damages.

The COURT: I am not quite so certain whether that would be part of the damage to the goods anyhow, the damage sustained. However, I think you should have alleged a special damage there. \* \* \*  
It isn't shown by that list?

Mr. MAURY: It isn't shown by the list.



(Testimony of Nick Wagner.)

The COURT: And it isn't shown in the complaint? [165]

Mr. MAURY: No.

The COURT: I will sustain the objection. If it isn't pleaded, I don't know how you can show it.

Mr. MAURY: I want to put in an offer of proof at this time.

PLAINTIFF'S ORDER NO. 1. (In writing)

"Plaintiff offers to show that the values in last column of Exhibit D-5 are after he had spent \$2200.00 in having his merchandise cleaned."

(Signed)

"Colton—Maury."

Mr. HALL: We make the same objection as previously.

The COURT: (reading offer) I will sustain the objection.

Mr. MAURY: We except your Honor.

The COURT: Let it go into the record.

I cannot tell you who made those figures that are in handwriting here,—Mr. Colton or Olivia, my daughter. I couldn't tell you whether they were made in Mr. Colton's office; I was sick, you know; I am not healthy. I told them to put the values down. I told them what I thought they were worth after; and what they were worth before, that is what the goods were before.

Q. And this was what they were worth after?

A. I didn't know what they were worth, but we thought that is what they were worth.

(Testimony of Nick Wagner.)

Q. And was that the worth of these goods here after they were cleaned up, or before?

A. No; we didn't know it; they was not worth that at that time.

Q. Did you give these values to Mr. Colton, of the value after they were cleaned up, or before?

A. After. You couldn't do nothing before.

Q. And was this what you thought the values were after they came back from various cleaners?

A. Yes.

Mr. HALL: We object to that as leading. Counsel is trying to lead him to say that is what he thought they [166] were worth before they were sold. The witness testified on cross-examination that practically all those goods had been sold at the time they made that list in 1933. Your question is: "Is this a list of what you thought the stuff might be worth".

They were sold after they were cleaned up—you bet you. None of them were sold before they were cleaned up; nobody would want them. The cost to clean them, everything—soap and stuff like that, amounted to around \$2200.00.

#### Recross Examination

(By Mr. Hall).

When Mr. Howard made the assessment in 1929, he came into my office in the store and I told him to look at the books; I had the invoices, and he looked those over,—I don't know; I went out.

Q. He looked over the books you had the first of the year and you told him to assess it?

(Testimony of Nick Wagner.)

A. Yes; around about the first of March. As a matter of fact, it was the second of May he came around (that is what the affidavit shows on the assessment list—2d of May); and from those books he made the assessment.

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OLIVIA WAGNER,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination

(By Mr. Maury).

I am the Olivia Wagner spoken of in the testimony. An assessment list with my name on it has appeared in the evidence. I didn't own any of those goods. Nick Wagner, my father, owned it. I helped him prepare lists of his merchandise. I did it as carefully as I could and put down absolutely what he told me. I commenced helping him on that about a month after the flood,—we started. This list here (Plaintiff's P-3), those figures are all [167] in my handwriting, taken from what he told me—absolutely. I had some knowledge of the business myself. I usually help him in that line; I am not in the store, but I helped him of nights, frequently.

Cross Examination:

(By Mr. Hall).

These figures on defendant's Exhibit D-5 are my figures too.



JOE D. CULLEN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is Joe D. Cullen. I have lived in Wibaux since July 15, 1911. I was mayor of the town on a visit of Mr. Rapelje and some other Northern Pacific Railway officials there once. That visit took place in 1922. At that time I knew none of the railroad officials that got off the train but Mr. Rapelje; there were others there that got off with him, that seemed to be in his crowd. How I happened to meet him at the train, the station agent, whose name I can't recall at the present time, 'phoned me that Mr. Rapelje, and I think he said others, were coming through on a train and desired to meet the citizens of Wibaux. I then notified Mr. White, who was secretary of the Commercial Club, and I think Mr. Fisher, the president of the First National Bank, and I can't recall the other places. But I told each one I called to spread the news that Rapelje would be along,—that he wanted to see some of us. I don't recall whether I notified Dan Sutherland or not, but Dan was running a livery barn at that time, and drayman, and he wasn't always at home; he was up on the street hunting business. As to what took place at that meeting (well, if it could be called a meeting), a number of us went up to the depot [168] and Mr. Rapelje was at the head of the procession coming out of the car and knowing him personally,

(Testimony of Joe D. Cullen.)

having met him, I introduced him to others. I can't recall the names; they were strangers to me and my crowd—the people from Wibaux; they shook hands around there and Mr. Rapelje was acquainted with a number of them; and we went down on the street. Speaking from memory, I would say that Mr. Rapelje and his crowd were there that morning in the town, three-quarters of an hour.

Q. You may tell the substance, or give the exact words. If you can't give the exact words, give the substance of the conversation. Give it to the jury.

A. My objection in going there was to ask for a change in,—I call it the “viaduct”; some call it the “bridge”. Previous to my administration, the railroad was supported there with wooden piles. This (indicating) is the point I am speaking of on the profile—that is a new one on me. I can recognize this as Wibaux Street, and Orgain Avenue. That is the point I am now speaking of. We came from that longer building—the depot—and we came down on Wibaux Street in front of that viaduct, and that was supported by wooden piling, and it was low. It was difficult for a team or loads of hay, or anything of that kind to go under it, and we couldn't fill up that street to drain it properly on account of having to keep the street low enough so that wagons, threshing machines, things of that kind, could go under it; and we had asked for a concrete viaduct. That had been promised, as I understood it from my predecessor, Mr. Fisher. The

(Testimony of Joe D. Cullen.)

conversation was there: I told him that is what we were asking for,—that concrete viaduct—and he said,—it may not be the exact words, but the substance was, “We expect to put that in there,” that was “on the plans”, or something to that effect, “but when we put it in here, we expect to raise that track. If we put it in in the present condition, you would always have a low viaduct there. We are going to raise [169] that track four feet, but when we do that, you will see what will happen. We got to raise the track this way and that way,”—that would be east and west along there, “or else it would make a ‘bump’; you will have to grade way up there, and we will have to put in a new bridge or raise it.”

Q. Who said: “We will have to put in a new bridge”?

A. Rapelje was the man I was talking to; the other fellows might have been around. Rapelje was the man I was talking to. He mentioned that as the additional cost, that it was going to “cost too much”; that they “couldn’t afford to do it at the present time,” and he gave a promise,—possibly a little indefinite as to time—but, “We are going to do this.” When he said the “bridge”, I thought he meant the bridge; I call that on Wibaux Street, the “viaduct”, and a bridge——

Q. And the “bridge” was that——

A. That one there over Beaver Creek.

Mr. MAURY: This is only for the purpose of identification in case it might be needed on cross-



(Testimony of Joe D. Cullen.)

examination of other witnesses, so Mr. Cullen can go back home.

Q. Have you kept records of rainfall in Wibaux?

A. I have, yes. I kept it officially for two or three years; that was in Coolidge's time; that official record was discontinued, but for my own information and the information of my neighbors, I have kept a record of the rainfall in the gauge, the Government gauge there, and that was not kept in the book; it was simply pasted up in the cream station, previous to the flood; that was all taken away. I haven't those new ones here in this building; I have them in my room at the hotel in town here, from 1930 to last fall. I keep the records only for the growing season. They have been kept with substantial correctness. I will leave them with the reporter before I leave town. [170]

#### Cross Examination:

(By Mr. McCarthy).

I was the mayor of Wibaux in 1922. I had known Mr. Rapelje for some time; I knew him at Glendive. In 1922 my business was—I had been selling lumber ever since I have been there,—ever since I have been in Wibaux, and I am still selling lumber. The Northern Pacific agent told me that Mr. Rapelje and other officials were coming through and they would like to have a meeting with the officials of Wibaux. I went down to the depot and when the train came in, Mr. Rapelje and his party got off. I don't now recall who the other officials

(Testimony of Joe D. Cullen.)

of the railway company were that were with him. You understand, in explanation, they were strangers; I have been told since, but of my own recollection, I don't know. Among those that I notified were Mr. White, the editor of the paper.

When the railway party got in, and got off the train, the whole crowd—both the Wibaux officials and the railway officials—went down to Main Street or Wibaux Street, and most of us stood down near this viaduct or bridge over Wibaux or Main Street.

Q. Mr. Rapelje did?

A. Mr. Rapelje was with Mr. Ed. Fisher, who had been the mayor; not the banker;—he is gone now, and Mr. Bushell, who had been mayor before him.

Q. Mr. Bushell was there?

A. Mr. Bushell, Mr. Fisher and myself. Mr. Fisher is a lawyer, out in Washington now. He is former mayor and he no longer lives in Wibaux. He is a lawyer.

Q. The purpose in the railway officials meeting you was in answer to a complaint, or in response to a request from you people,—I mean the people of Wibaux—to do something to remedy the condition of the bridge or viaduct over Wibaux or Main Street?

A. That was the principal thing; yes, sir. One of the other things was a request that the railway company put in an underpass up near the school-house. That underpass was put in shortly after that—that [171] same year, as I recall it.

(Testimony of Joe D. Cullen.)

Q. Mr. Rapelje told you at that meeting to which you referred, that the railway company would put in a school underpass right away?

A. He told another fellow to go up with these men to see what was wanted. I think it was Mr. Fisher and Mr. Dahl that had children in the west end of town,—they wanted that up there. Some of them that were vitally interested in that pass went up with the other men, and Rapelje stayed down there with Bushell and other men I can't recall. I complained to Mr. Rapelje about these piers under this viaduct or bridge over Wibaux Street, and about the difficulty that hay racks couldn't get through, and binders couldn't go through, and Mr. Rapelje said it was planned at some time to raise that up, that is, raise up the bridge or viaduct over Wibaux Street and he explained to us that if the viaduct at Wibaux Street was raised, that would make a "bump", and consequently, it would be necessary to raise the track to the east and to the west. I understood that meant a raise in the track,—not just a few feet each side of the viaduct, but for a considerable distance east and west. I knew they couldn't raise the viaduct at Wibaux Street to give us the necessary clearance, or the clearance we wished for hayracks and other vehicles, without raising the track for a considerable distance to the west and for a considerable distance to the east. I understood that to the east it probably meant a raise in track as far as the stockyards; as a matter of fact, it was raised just this side of the stockyards.



(Testimony of Joe D. Cullen.)

Of course, if they raised the track easterly from the Wibaux Street viaduct or bridge as far as the stock-yards, they would necessarily have to raise the bridge over Beaver Creek, and that is what I understood Mr. Rapelje to mean. There was no complaint from me to Mr. Rapelje about the bridge over Beaver Creek at that time, and there was no complaint in my hearing, from others, although I wouldn't say there wasn't there. I heard [172] no talk to others by Mr. Rapelje nor heard him say anything about the adequacy or inadequacy of the Beaver Creek bridge; I heard nothing of the kind. The only talk was incidental to the raising of the track that would have to follow if the viaduct over Wibaux Street was raised.

I am the same Mr. Cullen who has been referred to in the testimony here, the manager of the lumber company located at Orgain and Wibaux Streets.

Q. It was said that on the morning of June 7th, on the day of the flood at Wibaux, Mr. Cullen was crossing the street in the vicinity of the lumber company, or was attempting to, and using a neck-yoke as a prop, are you the same Mr. Cullen?

A. Yes, sir.

Q. Where were you going from when you were attempting to cross the street?

Mr. MAURY: Objected to as improper cross-examination.

The COURT: Sustain the objection.

Redirect Examination by Mr. Maury:

Q. Mr. Cullen, are you the same Mr. Cullen that is mentioned as "J. D. Cullen, Mayor" (pointing to

(Testimony of Joe D. Cullen.)

minute book), and where the clerk was instructed to write to the superintendent of the railway——

Mr. McCARTHY: We object to him reading those minutes.

That is my signature. K. M. Orgain, mentioned here as clerk, is sitting back here in the audience; and that is his signature.

The COURT: What is that book?

Mr. MAURY: This book is the minutes of the town council of Wibaux, page 154.

The COURT: And what date?

Mr. McCARTHY: That is the same resolution you read to the jury the other day.

Mr. MAURY: Date, March 7, 1923.

I said there was a statement made that the railroad would put in a new viaduct here at that conversation. It was a little over [173] seven years after that statement was made by Mr. Rapelje, before any new viaduct was put at that point. As to whether Mr. Rapelje was speaking about his own views or whether he mentioned plans to raise the railroad track,—that plans were in existence,—will state that my recollection is he said, “That is on the plans”, or something to that effect, “at St. Paul”, or wherever the head office is; raising that track was on the plans, and that new viaduct. Whether I understood that he meant draftsman’s plans or engineering plans, well, I don’t know that I differentiated; he just said a “plan”. I had a picture of a blue print or something that he was going to do that; that was his business—not mine.

(Testimony of Joe D. Cullen.)

Recross Examination by Mr. McCarthy:

I said that this conversation as far as Mr. Rapelje was concerned, took place down underneath the bridge or viaduct over Wibaux Street. Mr. Rapelje did not at any time, walk down to the Beaver Creek bridge,—at least, I didn't see him,—unless he went down after he went up to his coach again. As far as I know, he never went down to the Beaver Creek bridge.

I am not a plaintiff in any of these actions against the railroad.

(By Mr. Maury).

Personally, I never did have any lawsuit of any kind.

(By Mr. McCarthy).

I didn't sustain any damage in the flood; I work for a company; I am an agent.

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WILLIAM E. MANNING,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

My name is William E. Manning. I am at present deputy county clerk and recorder in Wibaux County. I was in Wibaux on [174] June 7, 1929. I was on the Northern Pacific fill during the morning of June 7, 1929. With reference to water on the



(Testimony of William E. Manning.)

north and south sides of the fill, I walked down to where that viaduct is and of course, looked on both sides. It appeared to me that the water was a good deal lower on the north side than it was on the south side; how much, it is all a guess. I have already guessed five to seven feet on the previous trial; it appeared to me that way.

I owned a building, a theatre, on Orgain Avenue at that time. There was plenty of change in the furniture, you might say, that took place during the flow; it was all moved around every direction. Another article there, after the flood, that I didn't have before,—I accumulated a tree in the front end, or chopping block, or whatever you want to call it. It was five to seven feet long and probably 18 inches through. As to how that got through into the building, from a hole that I found there, it apparently had broken through the two storm-sheds. This hole was on the north side. Surrounding the place where it got in, on other sides, there was a brick building on the east; a frame building right up against it on the whole length on the west, and a hollow-tile building a few feet back of it to the south. I found no hole on the other sides corresponding with that. The height of that hole from the ground was possibly four feet.

I saw a train standing on this fill that morning. I crossed through it,—a train was standing there. It would be pretty hard to say how many cars there were; I would guess there was 10 or 15. I saw servants of the railroad there, or men apparently

(Testimony of William E. Manning.)

in charge of that train; that is what I took them to be. I only saw one. He was doing about the same thing I was; he was walking along down the side of it looking at the flood.

Cross Examination:

(By Mr. McCarthy). [175]

My theatre building was directly west of the Albert Pickering pool hall, the next building to the Pickering pool hall. This opening that I speak of, that the tree—was on the north side of my building. The north side of the Pickering pool hall has glass windows; so has my building. My building has glass windows too. To my knowledge, the glass windows in the Pickering pool hall were not broken. I would say that Wibaux or Main Street is higher at the southerly line with Orgain Street than it is where it passes under the viaduct. So, after leaving Orgain Street on Wibaux Street, there was a natural slope as you went towards the viaduct; and it looks that way to me, that the ground north of the viaduct is lower than Wibaux Street at Orgain Street, so that naturally, water running down hill, would I presume, be lower on the north side than it would be on the south side.

Redirect Examination by Mr. Maury:

I never did see it such a difference before, of five or seven feet, in the distance of that railroad fill; that is the first and only time.

(Testimony of William E. Manning.)

Recross Examination by Mr. McCarthy:

Q. That is the first and only time you ever saw that amount of water before, isn't it Mr. Manning?

A. I never saw anything like it before, or since.

(By Mr. Maury).

I have lived there since March, 1911,—at Wibaux and Beach—I was in Beach, North Dakota; I was in Beach a while.

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K. M. ORGAIN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

I have lived in Wibaux practically all my life. Orgain Avenue there is named after my father. You are pointing correctly [176] to my residence, where I lived. The Orgain residence is south of Orgain Avenue, west of E Street, east of D Street, and the most westerly house in that block, fronting Orgain Avenue.

I was city clerk of Wibaux, and was city clerk on April 3, 1923. That is my signature and J. D's (J. D. Cullen) too. I was city clerk also on March 7, 1923, and this is my signature; and that was Mr. Cullen's signature as mayor.

Q. The records show Mr. Orgain, that "the clerk was instructed to write to the superintendent



(Testimony of K. M. Orgain.)

of the railroad in this division and see what could be done to carry off the flood water in the vicinity of the elevators." What did you do with reference to that?

A. I performed my duty. I haven't any independent recollection at this time.

Q. And what was your habit as to that—doing what you were ordered to do by the council?

Mr. HALL: Mr. Maury, we have admitted that letter was received about the elevator, and the testimony shows we complied with it; and there is no dispute about that.

Mr. MAURY: Where is the letter?

Q. Mr. Orgain, I call to your attention in the minutes of the meeting of April 3d, 1923, some bracketed words—words which have been penciled, and which I now again pencil—who wrote those words, and when were they written?

A. I wrote them and they were written the 3d day of April, 1923.

Q. What was your habit of business, or what were your duties as city clerk?

Mr. HALL: We object to this line of testimony—

Q. Just a moment: And were you paid some compensation for your work as city clerk?

Mr. HALL: We object to this line of testimony as to his habits, and so forth, as immaterial for the reason that the resolution itself—the entry there—shows that [177] it is in no way connected with

the railway company, or that he was directed to give any notice to the railway company by such resolution.

We wish to cross-examine him in the absence of the jury on that question, before the court rules on that.

Mr. MAURY: He hasn't been asked any questions except as to his habits and his compensation and what his duties were. We will carefully protect you as to the contents of the records until the court rules. These are merely preliminary questions, I suggest to the court, that may be answered by "Yes" or "No", without giving the jury any intimation as to what is in that record.

The COURT: Do you propose to follow that up to show that notice was actually given, or is that merely a record?

Mr. MAURY: We cannot get the actual memory of the transaction from the witness. He was frank, sincere,—has always been; as to actual memory of having done that thing he has none. But he can only tell as to his custom, his habit, the duties of his office, and as to whether it was his custom to perform those duties.

Mr. HALL: In order for the court to better pass on our objection, I think the matter should be taken up in the absence of the jury. (Jury excused.)

The COURT: Well, I suppose if this were admitted, your records would perhaps show that you received a communication or you didn't, and that

(Testimony of K. M. Orgain.)

it was never carried out. That would be your defense, perhaps.

Mr. HALL: We, of course, deny that we received any such communication. At each of the other trials, this witness has testified that he had no recollection of having written any letter pursuant. (Take this down): And we object to the introduction of the resolution, or introduction of the minute entry being read to the jury for the reason that it does not direct the clerk to [178] notify the railway company. The resolution reads as follows: "The clerk was instructed to draw up a resolution asking the railway company to provide a larger water way under their bridge over Beaver Creek." The witness has testified at the other trial that he drew no resolution at all, and we contend that this minute entry requires the clerk to draw a draft of a resolution which should later be submitted to the Board for adoption or rejection, and the testimony shows nothing of that kind was done, and the witness has testified that he has no distinct recollection of having done so or written the letter. That being the case, we object to this witness testifying regarding it.

Mr. MAURY: The jury being out, we desire to proceed with a few questions to the witness:

Q. Mr. Orgain, what did you understand the drawing of a resolution meant?

Mr. HALL: We object to that. The record is the best evidence; he was "directed to draw a resolution."



(Testimony of K. M. Orgain.)

The COURT: What did he understand,—did he customarily do, when he got such an instruction as that from the council?

Mr. MAURY: Answer it freely now; the jury is out.

A. In fact, I performed the duties of my office and have never been “fired” or anything of that kind for not performing my duties. No one has ever charged me with being negligent of my duty. Neglect of duty has never been called to my attention by anyone. I understood from this instruction, that I was supposed to let the railway company know that we wanted a wider waterway through their embankment under the bridge.

Q. And having in regard your custom—what your habits were—what would you say to the court that you did when that resolution, or whatever those words mean, was passed? We don’t ask you, Orgain, for your independent memory for years, because we all know for [179] years, that you haven’t got it. But speaking from your habits—your own habits—your custom—your attention to business—what did you do?

A. Well, sir, I informed them what the town council wished as explained in those—

Mr. HALL: We object to that answer as not responsive to the question. It is assuming that he did give them something, when the witness says that he has no recollection that he did. He can’t “worm” that in that way.

(Testimony of K. M. Orgain.)

Mr. MAURY: We insist the witness be allowed to answer so the court can rule with the full knowledge of what the witness can testify to about it.

The COURT: Q. What was your habit in the ordinary course of business as city clerk, confronted by an order of that kind passed by the city council?

A. Well, sir, I would write that letter.

Q. What about the resolution? Would you draft it in the nature of a resolution?

A. I don't believe I would. I doubt very much if they asked for me to draw up a resolution. But it has been so long ago that I couldn't now be—I would be very foolish to swear that I remember writing this letter and mailing it. If it was anywhere else except on the witness stand, I would say I wrote that letter.

Q. But you haven't an independent recollection of it at this time, is that it?

A. No, sir, I haven't. I remember the discussion at the council meeting.

Q. How long were you city clerk?

A. A couple years; I don't just remember.

Q. You have received directions of that kind before, or of a similar nature?

A. I have. The minutes show there before that—I believe it does—before these minutes.

Mr. HALL: Q. The council draws ordinances. Ordinances [180] were drawn while you were city clerk?

A. I believe they were.

(Testimony of K. M. Orgain.)

Mr. HALL: My objection is, that this minute calls for the drawing of a resolution, without any direction that that is to be mailed to anyone; that if the clerk had assumed of sending something to the railway company, he violated his duty in doing so, because he hadn't been directed to do it. On the further ground that the witness has no distinct recollection now of having written a letter. Taking the entry of the day before——

Mr. MAURY: The month before.

Mr. HALL: The month before—March 7th—regarding the culvert there, it says: “The clerk was instructed to write to the superintendent of the railroad.” We admit he did write; we admit we received the letter; we admit we put in the culvert. Now, he is directed to “draw a resolution”; he hadn't been directed to send anything. So, to come in now,—and he says he hasn't any recollection of doing that—and when the minute doesn't direct him to send anything——

Mr. HALL: Q. You do have resolutions drawn by the city council in addition to the——

A. Yes; an attorney usually draws them, so I am familiar with the fact that if a resolution is drawn, it would be referred to the attorney; I do now. As to whether it would be the practice to take a vote on the resolution,—I do now, at the present time, at that time, I don't think I did.

Q. At that time, you thought a resolution meant a letter?



(Testimony of K. M. Orgain.)

A. I am not as smart as I thought I was. You brought it to my attention.

Mr. HALL: That is our objection. It was attempted to be put in at the last trial.

Mr. MAURY: He said at the very first—I have announced to every court that this witness, as for independent recollection, he has none. [181]

The COURT: Let me ask him a question or two?

Q. Now, through this book,—how long did it take you to use up this book? This is the book of the minutes of the council proceedings, is it?

A. Yes, it is.

Q. Were you the clerk during the two years, you say?

A. Two years, I should judge.

Q. Now, it appears in the other minute entry referred to a short time ago, while you were on the stand, that you were directed to write. Now, if you were directed to frame a resolution, what do you understand by that,—that you were to draw a resolution and submit it to the council at their next meeting?

A. No, sir; I didn't understand it that way. I would understand it that way now. But the idea was in my mind, and I think in the council's mind too, was to let the railroad know that we wanted a larger outlet for that water.

Q. Well, then the word "resolution",—when you are instructed to draw up a resolution, does that

(Testimony of K. M. Orgain.)

mean write a letter? Did that mean write a letter, in your mind?

A. It was.

Q. Where can you show any other instance where they asked you to draw a resolution and you wrote a letter, and that is what you considered it to mean? Something to illustrate that, so the court can see what you were going on and so interpreted it?

A. (witness looking through book). Here it is your Honor; it isn't a resolution. I was directed to write a letter. (indicating in book).

Q. When they directed "write a letter", they told you to do that, didn't they?

Mr. MAURY: There is something else. Was that ever mentioned in any meeting thereafter?

A. I doubt if it was.

Q. Any minutes of it, or was it ever to come back to the council?

A. None that I can see.

Q. You have examined these minutes. Is there any mention of that [182] resolution coming back, or was it supposed to come back?

A. There is none. I doubt very much whether it was supposed to come back. I can't find any place where I was instructed to draw up another resolution.

The COURT: Q. You can probably recall if the council were in the habit of instructing you in

(Testimony of K. M. Orgain.)

that way, ordering you to draw up a resolution,—meaning by that that you are to write a letter?

A. If they instructed me to draw up a resolution now, I would do it, or have it done. At that time, I doubt very much if they instructed me to draw a resolution.

The COURT: I think from the record of the examination of the witness here, I ought not to allow that to be read to the jury.

Mr. MAURY: There has been a sufficient offer of proof?

The COURT: Yes.

Mr. MAURY: And we except to the court's ruling.

The COURT: Yes; I will have to sustain the objection. Call in the jury.

(By Mr. Maury, continuing):

I can recall the incident of a horse swimming in the flood there on the morning of June 7th, 1929. The horse started, when I first saw him,—there is the ice house,—well, this horse was in a stable somewhere, and he came from this icehouse and he swam over to the railroad embankment, and a party went down here to catch him; he was tired and he was mired in the mud, but he got frightened and he turned around and swam up on this high ground here by the icehouse, without resting; it was an ordinary sized horse.

Mr. HALL: The icehouse is in what block there?

That (indicating) is the icehouse; I think that



(Testimony of K. M. Orgain.)

is it; that is just south of First Avenue South and west of E Street, and there [183] are two little houses there on the profile.

I can't recall when the sidewalks were first raised going to the Davis Addition; it was several years ago—several years before 1929,—I would say six or seven years. I recall that there is a building here, called the “Woodburn Building”, sitting on piles. I would guess that that building has been sitting up on piles 10 or 12 years. I don't know whether that building was moved from Main Street and First Avenue. The height of those piles, they are five feet—five or six feet.

#### Cross Examination:

(By Mr. McCarthy).

This icehouse to which I refer is generally in a southerly direction from my home.

Q. Did any buildings come down into—float or drift or were carried,—transported by the water—into the district immediately north of your home or immediately south of your home?

A. South, there were. One was a residence; it was a fairly good-sized house, seven or eight rooms; the outside of the house was yellow. I know just about where that house was located before the flood; it was in the vicinity of the city water tower.

Q. What were some of the other buildings or debris that came down there with the flood into your yard or just south of your yard?

(Testimony of K. M. Orgain.)

A. Well, there was what they call the Odd Fellows' Hall; it was turned around; it didn't float very far. I don't believe there were some posts or piling of some kind that stopped it; I think it lodged on the ground. Whatever distance the Odd Fellows' Hall moved, that was generally speaking, it was off its foundation, it had moved generally speaking, in a northerly direction.

This Woodburn Building that I speak of, is located right near the end of the spur track of the railway company. That building is used for a warehouse I believe,—Sawyer's store. Goods are received or taken from the warehouse and put into the railroad [184] cars, put in and taken out, both. They spot a railroad car alongside the warehouse, or they take goods out of the warehouse and put them in the railroad car, I suppose. It is important enough so as to have the arrangement such that they can have a level there, have the cars so they can run goods out onto the floor. There is piling at the easterly end of the building. I couldn't say whether those piles are as long as the piles at the westerly end of the building—I couldn't say about the westerly end; I don't know whether there is any under it or not. I believe you are right; I was mixed up, I got the ends turned around,—I believe it is a fact that the land at the west end of the building,—the Woodburn building,—is lower ground than the ground at the east end of the building; that they have simply put in piling there in order to level the floor of the building. Looking

(Testimony of K. M. Orgain.)

at the model of the Woodburn Building here, I believe the piling at the west end of the building is longer than the piling at the east end of the building, if there is any at the east end, and I suppose that the floor is approximately level with what would be the box-car floor.

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W. C. HOWARD,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

I took pictures of certain scenes around Wibaux the day of the flood, June 7th, 1929. Plaintiff's exhibit 18 correct represents a scene that I saw there on that day; it is a correct view.

Mr. McCARTHY: They have all been received in the other trial. No objection.

Plaintiff's exhibit 12 is a true picture; 15 is a true picture; exhibit 14 is a true picture that I had seen; exhibit 10, another true picture; exhibit 11, another true picture, scene of the [185] flood. Exhibit 16 is a scene after the flood; that is near the post office; it is Mike Heckaman's filling station, Ole Helvig's shop. Those buildings all join there onto Nick Wagner's place of business. That picture must have been taken within the next two or three days after the flood; they were drying out



(Testimony of W. C. Howard.)

their merchandise there. Exhibit 19 is another true picture; the camera was on the embankment; I was standing right west of the viaduct; the camera was facing south and a little west; I was possibly two or three, or four or five rods from the viaduct, I couldn't say. That was taken—guessing at it, I would say around 9:00 o'clock maybe, on the morning of June 7th, maybe a little sooner.

There is another true picture, and this one. Exhibit 20 was taken after the one you just had shown me, because the water is deeper on the dwelling there. This was taken from almost the same point as the other one; I was facing southwst and on the railroad embankment west of the viaduct.

Exhibit 21 was taken from near the viaduct, the camera facing south; I must have been within a rod or two at the time that picture was taken, of Main Street. I don't know whether I can recall this object here or not. I seen that cow on there, and I was watching the water rise on there taking the picture; that was taken while the water was rising. That cow had to swim after a while. I couldn't say for sure whether that cow got up on something or whether that was another cow. Two cows got tangled up there, and another one at the Orgain building there, at the corner of Orgain Street. That cow got up on the platform somewhere around 10:00 o'clock I would say, between 9:00 and 10:00.

Exhibit 23 is another picture of Main Street; camera facing south. As to the time that was taken

(Testimony of W. C. Howard.)

with reference to the other pictures, I was taking pictures possibly about 20 minutes apart, until I had taken five—all the shots I had in the camera—I had run out of film. This wasn't the last one I took; I think [186] possibly the last one was taken of dwellings in the west part of town there. This same cow was in this picture, but a slightly different place from where she was in the other picture. That is Albert Pickering's store. They didn't move the automobiles after the water got that deep. I wouldn't say that that is the top of an automobile there; the top of an automobile would stick up farther out of the water than that object there.

I got up at possibly around 6:00 o'clock that morning—maybe a little before. I didn't see any wall of water. As to how observant I was of conditions, I was taking in the sights all the time until the viaduct—until the grade broke and the water went down; I was out on the grade continually, I guess.

When that picture, plaintiff's exhibit 22, was taken, the camera was setting right close to the county agent, Mr. Ostby's home, in the Davis Addition; that was in the 1929 flood. It was in the forenoon when that was taken,—between 7:00 and 10:00. This building that appears in the picture to be a little to the right of the water tower is what they call the Mattie Miller residence, or the green house. That is here on the map (indicating), this house; and I would say this is Ostby's house. The camera was setting here at Ostby's house and facing

(Testimony of W. C. Howard.)

towards the Miller house—facing west. (Ostby's is the house with the dyke on the north side and east side, and on Esther Avenue west of Beaver Street.) I didn't take that picture; I can tell where it was taken from though; I am familiar with the scene there, and I can recognize the buildings in it.

I was the assessor in 1928,—1929. Explaining the formalities that took place when I made Nick Wagner's assessment in 1929—what took place there,—how it was made,—I walked in his place of business to take his assessment just the same as I always have, as far as that goes, and told Nick I was "back again". I don't know just what took place as far as the conversation is [187] concerned. He says, "Here it is," and I put it on paper and he signed it. Everything except what was printed was in my handwriting, and except Nick's signature.

I was on the railroad embankment taking pictures there about every 20 minutes. It looked to me like there was seven or eight foot difference in height on June 7th, between the water on the south side and the water on the north side of the embankment. The highest was on the upper side or south side. It didn't remain very long at that difference in height; when it got to its peak, it wasn't long until the bank broke and it went down, and it went down fast. There is a lot of guessing there as to how fast it went down when the bank broke; it was probably a couple hours—maybe, I don't know—before we could get down on Main Street.



(Testimony of W. C. Howard.)

Q. About what time of day according to your best memory, was it when you could walk back on Main Street and near the Wagner place of business?

A. Well, it was sometime in the afternoon, possibly about 3:00 o'clock, before you could get back onto Main Street, because of a swale or draw on the west side of town; and when I went down onto Main Street, the water was two or three foot deep there when there wasn't any on Main Street. I couldn't see how many sections of the fill broke out; it broke away and broke away, and at one time, it seemed like there was an extra large portion of the fill went out; that was east of the viaduct on Wibaux Street there, not far from the depot,—100 feet or 200 feet or so. I don't know how much of the fill went out at that time. Altogether, I would say there was 100 feet, 200 feet, or 150 feet,—I couldn't say. I didn't see anything that day in the nature of a wall of water anywhere.

Cross Examination:

(By Mr. McCarthy).

When the railroad embankment went out, it crumbled and melted away, of course. But it went out in chunks too; I would [188] hate to describe it myself. When the so-called going out was completed at one place, I wouldn't want to leave the impression with the court and jury that the embankment went out so that it was leveled off completely. The embankment—the railroad grade—there, I should say was 12 feet in height maybe, I don't know.

(Testimony of W. C. Howard.)

Q. Whatever you meant was, that when it went out, a half of the embankment would go out, or better than half, but the complete embankment would not go out would it?

A. It kept breaking away almost to the level of the earth all the time as it went out—the embankment. It didn't work that way,—that is, times when part of the embankment would melt away—say the top two feet of the embankment; the water didn't affect the top two feet of the embankment, it wasn't up there; it had to come from the——

Q. The top would work down, would it?

A. Yes, sir.

Q. So, instead of having an embankment of a given number of feet after it gave way, you would have an embankment standing there of two or three or four feet less in height than it previously had been, is that the idea?

A. The embankment all washed out; there was a hole washed there where the embankment was 10 or 15 feet deep. That didn't all come at once; it had to eat out, of course.

Q. So, there were times when the embankment was about half of what it had previously been in height?

A. In that case, the top of the embankment would have to go first, wouldn't it? The whole embankment washed away and fell in to the level of the earth from the railroad track and kept breaking away in that way. Whether there were any pictures that I took that you haven't had the benefit

(Testimony of W. C. Howard.)

of here, will say that I think I only took five pictures.

I am still county assessor. I have held that office—this is my twelfth year. Before that time, I was a fruit-grower and worked on a ranch and farmed. I had been county assessor for about seven years when I made this 1929 assessment of Mr. Wagner's. So, in 1929, I was probably making my seventh assessment of that [189] store. I, of course, took an oath of office when I entered upon my duties as assessor—the same as any county official.

Q. And you lived up to your oath and did it to the best of your ability?

A. I should say that a person should.

Q. And you tried to?

A. In a way, yes; there is exceptions; we have one coming up.

Q. In assessing a stock in a store such as Mr. Wagner operated, it was your duty to assess the stock at full value, Mr. Howard?

A. That is what the law states.

Q. And you carried out the law to the best of your ability?

A. I don't think I did, in that particular case; I could mention others.

Q. Do you want to tell the court you violated your duties there in making the Nick Wagner assessment?

Mr. MAURY: Objected to as argumentative.

The COURT: Yes; that is a little argumentative.



(Testimony of W. C. Howard.)

Q. Mr. Howard, in making the assessment of the Nick Wagner store stock in 1929, did you fully and faithfully live up to your oath of office and follow the law of the State of Montana in so doing?

Mr. MAURY: Objected to as three different questions, and something that only a lawyer of very long, studious——

The COURT: I think he has answered that question already.

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EDWIN WEBBER,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Colton).

My name is Edwin Webber. During the years 1923 and 1924 I lived in the house just below the water tower next the creek bank, in the town of Wibaux, Montana. Pointing out where that house is on the profile map, it is right there (indicating). [190] In the spring of 1923 I observed the water coming down the street by our house, from the south, down this way.

Q. Going down E Street?

A. Right here, following this street——

Mr. McCARTHY: Witness indicating a point half way between the two white marks representing the so-called Senator Kinney cement wall on the

(Testimony of Edwin Webber.)

northerly side of Beaver Creek where the same is located about half way between the Miller house and the city water tank, as the point of beginning.

And following north on E Street to the embankment. I would say that I saw from a foot to 16 inches of water flowing down there at that time. I saw that phenomena twice there. The other time I saw that was in the summer of 1924. That water came from the creek over the embankment.

I was not in Wibaux during the 1929 flood, nor during the 1921 flood.

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MRS. DAN SUTHERLAND,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury.)

Where I lived on June 7, 1929, appears on the profile. This is the house right here; it is east of Wibaux Street and north of First Avenue North. On the morning of June 7, 1929, the water commenced to rise in my house somewhere after 10:00 o'clock—somewhere around 10:00 o'clock.

In 1921, I was living at another place. This is the house (indicating). That is the house north of First Avenue South and west of E Street, the third house from the southeast corner. As to what I observed in the way of running water during the so-called flood of 1921, near my house,—the water

(Testimony of Mrs. Dan Sutherland.)

was in the street there around two feet or so. It didn't remain there so very long; I [191] couldn't state the time. That water was coming from that street between—from the water tank down opposite from the barn there. That (indicating) is what I mean by the water tank. I am the wife of Dan Sutherland who has been on the stand.

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Testimony of

JOHN BAILEY

who had been first duly sworn as a witness in behalf of the plaintiffs at the trial of case number 2444, Wibaux Realty Company, a corporation, (and other cases) vs. Northern Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 6th day of January, 1934, was at the request of counsel for the plaintiff at this time, read by the court reporter, as follows:

“Direct Examination by Mr. Maury:

“On the morning of June 7, 1929, early in the morning, I was working in the First National Bank basement. Something out of the ordinary that came to my notice that morning was ‘very much water’. I first observed that ‘very much water’ as I came down from my residence—from where I lived, and crossing the bridge—the railroad bridge; I crossed the railroad bridge. I came down, I should think,



(Testimony of John Bailey.)

between 4:00 and 5:00 in the morning. The condition there then, at the bridge,—the water was quite high, and of course, not so high as it was an hour afterwards. I then went to the basement of the First National Bank; that is where I worked; I am janitor there of the building.

Q. How soon did you get to your work that morning Mr. Bailey?

A. Well, I think, as I stopped to help some parties that were in the tree——

Mr. McCARTHY: Just answer the question. \*

A. Somewhere about half past 5:00, I should judge.

I lived out here somewhere (indicating) and came across the rail- [192] road bridge to my work. The course that I took, I went north and I crossed the railroad bridge, as I could not get across the wagon bridge at that time. I live on Davis Street. Indicating on the relief map where I lived, it was up here,—up here across from Massey's; I live on the hill from Massey's. When I got down here, I didn't cross on the county bridge and down the sidewalk, because there was too much water. As to the height of the water there when I went down in the morning—when I tried to get to town,—well, the creek was about bank-full. The ground to the east of the county bridge there when I started to go to work that morning, was under water. I would judge it was something like 200 yards under water then, reaching to the elevator on the other side—maybe a little more. I went around north to get to the

(Testimony of John Bailey.)

railroad bridge, and when I got across on the railroad bridge, I went west then on the railroad. I didn't go up as far as Wibaux Street; I went through the back way. The condition at the place where I worked when I first got there, there was no water there, and as far as I remember, I think it was something like half an hour, possibly an hour,—between 6:00 and 7:00, that the water began to come in from the north. I recall a concrete area-way back of the bank; I recall a wall; that wall runs north and south. The water that I first saw back there came from the north. As to how much of it came along when I first saw it,—well, it began to come over the wall probably two or three inches, and then it was a very short time that I see I had to get out of there shortly, and when I got up on the steps—on the ground, I should say, I think that the water must have been a foot or more. That is the same basement that Charles E. White's printing plant was in—connected up where I was working. I didn't see Heckaman and his wife leaving that morning. I was in the basement working and I just couldn't say what time it was that this water approached from the bank from the embankment—from the fill; I know what [193] time it came in; it was between 6:00 and 7:00. I went into the—I had a key. I stayed in the bank for a while putting up things and then went out of the west street door into the hallway that runs up to the bank office. By that time, when I

(Testimony of John Bailey.)

got there, I would think there was anyway three and a half or four feet of water on Wibaux Street. That was after I had fixed up everything. I would say that it was something like half an hour that I was working straightening up things in the bank.

Cross Examination by Mr. McCarthy:

When I went to work—when I walked across the railroad bridge—it was something like between 4:00 and 5:00. It was something like 4:00 o'clock when I got up that morning. Then I got my breakfast.

Q. And it would be 4:30 or more before you left home?

A. Well, we ate a hasty breakfast, as we knew about the water, my daughter having been out, we knew about the water and we was getting through as soon as we could. It was possibly half past 4:00 when I left home.

Q. You had to dress and eat your breakfast, and someone had to get breakfast?

A. We didn't have very much breakfast. We didn't stop for very much breakfast because we were considering the flood; that is what interested us. As to what I saw up there on the hill at 4:00 in the morning that indicated to me that there was likely to be a flood, the bottom of the valley was flooded; there was water on both sides of the river—creek; the bottom of the whole valley there was flooded. Pardon me just a minute,—there was no water in the town; above the town on the west side



(Testimony of John Bailey.)

there was water, and on the east side there was water in the flat.

Q. Yes, but at 4:00 o'clock you got up and you were living up here on this hill south of town and east of Massey, is that right?

A. I am east of town; I am north and east of Mr. Massey's place. I am up here on a hill that is southeast of town; it is on the [194] south or southeast; it is in an easterly direction.

Q. And at 4:00 in the morning you were worried about a flood away up here?

A. We seen the water,—shall I story? My daughter was out at about 3:00; she was up that night; she come home at 3:00; she was worried. There had been a big rain; and she got up at 3:00 o'clock and she announced to us, and that is the reason we got up early that morning. The water in the vicinity of Mr. Massey's place and where I lived,—we could look up there and see there was quite a lot of water in the low places. Pointing it out on the relief map where I looked, there was water (indicating).

Q. This group of houses over here on the relief map representing the Massey ranch?

A. There was water in the bend; it is rather low there; and then where we live on the hill east of town, and then there is a low place right in here,—we could see water.

Mr. MAURY: Indicating by the elevators.

But in the town there was no water.

(Testimony of John Bailey.)

Q. How about the water below where you lived and west of where you lived—below Mr. Massey's house?

A. I couldn't see below Mr. Massey's; I couldn't see below his place,—I should say, I couldn't see above his place.

Q. But as you looked across below where he lived, the whole valley across from the creek bed to the road going south——

A. No. There was quite a lot of water in the low places.

Mr. MAURY: In the low places, he said.

A. In the low places.

I intended to go across the county bridge when I started to town that morning. As to how close I got to the county bridge before I had to turn off, will say that I went directly from my house north. I see that the water in that low place there was quite a lot of water, and I see I couldn't cross the county bridge. I would say that I got a couple hundred yards likely, from [195] the county bridge before I decided I couldn't cross it. I didn't get down as far as the sidewalk that is on piles there; I went around by the railroad bridge. I am not much acquainted, to know what they call Esther Street and Beaver Street in there; I would not call them by name. I recognize the building here that is partially on piles—the Woodburn building—located near the southerly end of the elevator spur track. I didn't get as far on the road towards the county bridge as

(Testimony of John Bailey.)

the Woodburn building; I could have went closer than I did, but I went around.

Q. Do you think you got as far as the junction of the road to the south of the road, being the junction of Beaver Street and Esther Street, this point here (indicating), do you think you got as far towards the county bridge as this?

A. As I say, I went right north from my house to the railroad bridge. There is no road. I got onto the railroad embankment west of the stockyards. I got on the railroad about north of the elevator; I went between the two elevators; walked across the ground between the two elevators and got up on the railroad embankment. At that time, between the elevator track at the point that I crossed it and the railroad embankment there was some water; it was not very deep,—I imagine something like six inches possibly.

Q. About six inches of water at the elevator track at the point where you went half way between the elevators, where you left the railroad track——

A. I don't know as I went half way between them; I went between the elevators; it was closer to the northerly elevator. I kept above this low spot in here, and came across somewhere close to this most northerly pair of elevators to the railroad embankment. Having called my attention on the relief map to two objects, one representing a



(Testimony of John Bailey.)

loading platform, and this building here (indicating), that is where Mr. Heckaman's oil station is—not his oil station, but the Standard Oil station. I came up on the railroad embankment east of the oil building. [196]

Q. If you went between the elevators, then you must have walked northeasterly to get to the railroad track, is that it?

A. About very near north, but I came out on the railroad embankment east of the building that I refer to as the "oil building", and as I walked across this space between the elevator and the railroad embankment the ground was covered with something possibly near six inches of water. There wasn't any water over the county bridge at that time, but there was water between the county bridge and that low place—between my place and the county bridge. Pointing out on the relief map more definitely where that water was that prevented my getting to the county bridge,—this is the county bridge; the water butted right up to the track or to the elevator, but it wasn't to the bridge then, but it being low here there was water between there and the bridge so that I couldn't get across it,—that is, between the elevator and the county bridge.

When I got to the railroad track and reached the railroad bridge, water at that time was flowing freely underneath the railroad bridge. I couldn't estimate how deep the water was underneath the

(Testimony of John Bailey.)

railroad bridge at that time, only it was very nearly bank-full. At that time, it was flowing freely underneath the railroad bridge. [197]

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Deposition of

J. C. KINNEY,

a witness in behalf of the plaintiff, who had appeared pursuant to notice and subpoena on August 28th 1931, and who had been duly sworn to testify in this cause and on direct examination examined by Thomas C. Colton, Esq., counsel for the plaintiff, and on cross-examination by E. M. Hall, Esq., counsel for the defendant, was read at this time as follows:

Direct Examination:

(By Mr. Colton, reading):

“My name is J. C. Kinney—John C. Kinney. I reside at Tucson, Arizona. We moved there in fifteen, or the fall of nineteen-fifteen, the family, that is. I am still living there. I maintained a home here until probably 1923 or 1924. I suppose about eighty percent of my time was in Arizona. Before I went to Tucson, Arizona, I lived in Wibaux. It was Dawson County before it was Wibaux County. It was Dawson County at that time. I came to Wibaux in 1890, and I lived at Wibaux continuously, that’s my home since—until 1915. Beaver Creek was running through here at that time. At the time I came to Wibaux the railroad was coming through here.

(Deposition of J. C. Kinney.)

The nature of the bridge over Beaver Creek at the railroad crossing at that time was a wooden trestle bridge on piling. That bridge was changed afterwards. I am not sure when it was changed. Approximately, 1898, or probably 1896 to 1898. The channel above the railroad track, to the south, is a wide channel. It is a channel that has been there for years. Explaining the changes: the flood waters that came down changed the course of the stream and the Beaver Creek channel changed a good many feet since I came here. It keeps cutting the banks away and widening the channel. However, the normal channel of Beaver Creek when there is just a normal amount of water in it, is not wide. When there is high water, that is if snow melted or there were heavy rains, during high water, it would be a very wide channel. I have seen [198] Beaver Creek a quarter of a mile wide toward the east, from here at the bank over to the stockyards, during high water. When that water subsided after the high water, the nature of the ground when it receded, it is a gravel bed, not susceptible to cultivation; it is a sand and gravel formation that is left.

I had various lines of business in Wibaux. I came here as a cowpuncher. I was not a specialist in any line. I followed a good many lines. I was in the groceries and meats business and barber shop and livery stable and a banker. I ran my butcher shop on the east side of this street—Wibaux Street



(Deposition of J. C. Kinney.)

—where the Mercantile Building or the Wibaux Improvement Company Building is, where Nick Wagner is now. I ran the First National Bank here; I built that bank building in 1906.

At the time that I ran the butcher shop, the creek when there was ordinary high water, was pretty high. It had taken away the bank where my butcher shop was. We used to have a driveway in the back where we used to drive in with meat and provisions and the creek washed that away. The driveway was east of the building and west of the creek, and the creek ran right down there my way. From there it continued straight on north to the railroad on past the Wibaux property. It curved into the opening at the bridge from the Wibaux property. I should say the Wibaux property is, I suppose a hundred feet west of the opening. The water came down past the embankment of the Wibaux property and my property. I mean Pierre Wibaux's property. There is a wall there. I know that Pierre Wibaux caused it to be built, but I don't know who built it. That was built after I came. After the wall was built there, the creek run alongside of the wall. The creek has changed a lot since then; it is farther east now,—the main channel. I can tell you a lot about how the main channel happened to get changed. The railroad company put that channel in. The railroad company used gravel in surfacing the [199] roadbed. I remember it very clearly. It runs directly south

(Deposition of J. C. Kinney.)

from the railroad bridge, a little southwest possibly. As to how far it went from that channel, it went from near the bridge to what used to be our creek crossing and that's where the old crossing was from Dahl's blacksmith shop, they dug the channel to intersect at Beaver Creek at that point. As to why that was done, well, it straightened the channel. I had water in the basement while I was running the butcher shop in Wibaux, on the corner where Nick Wagner is now. I was acquainted with W. A. Orgain in the old days. He ran a store on the corner of Wibaux Street. I know that he had water in his basement. There were many people who had high water in their basements. The cause of it was, when the water would rise in Beaver Creek, it would filter into the basements.

Q. During those times, did you have occasion to observe the habits of the stream, during those times when there was high water? What was the habits of Beaver Creek?

A. It was good high water with lots of force, if that's what you mean.

From the fact that I had water in my basement of the butcher shop, I had lots of occasions for observation of the water in the creek. I have seen lots of floods in this vicinity. We were subject to downpours here, what you would call cloudbursts and on occasions of this sort, Beaver Creek would come up very rapidly. It would rise quickly and it had a great deal of force and water.

(Deposition of J. C. Kinney.)

Q. Did it go through the opening at the bridge during those times? Just explain——

A. Well, I stated before that I had seen this flat all over here covered with water. A solid body of water from here to the east. I have seen that a good many times. I would say about six or eight times, during all the time that I was here. Whether I observed the depth of the water on the south side of the embankment in comparison with the north side, [200] the south side was higher than the north side, that is, the water would check more or less.

Q. What would check?

A. Well, I suppose there is the approach to the railroad bridge. As to why the water was higher on the south side than on the north side, well, the approach was not sufficient to carry all the water through on an even keel and there was a volume of water at the approach as it was narrower than the flats out here in comparison and the water could not go through on an even keel or could not go through such an expanse much narrower on the same margin that it could have had there been no obstruction. What I mean by “expanse”, well, there is a quarter of a mile of level land here that the water would cover and as the approach at the bridge was narrow, it would naturally raise the water on the south side to a certain extent depending on the volume above it. I have seen it this way on several occasions.



(Deposition of J. C. Kinney.)

Q. Now, in connection with First Avenue South—do you know where that is?

A. Well, we didn't need names for our streets in those days, we were guided by the livery stable or the blacksmith shop. It is a continuation of the highway running east of the bridge. I was here when that bridge was built. In connection with the old channel, that bridge was placed east of the old channel, about a hundred feet or more. I don't remember exactly when that bridge was built, but I would say about 1908 or 1909.

Q. Now, those floods that you talked about, I believe you said six or more times, the water came down to the county bridge where there is a little fill, what course would the water take then?

A. If it was not too great a volume, it spread out, it spread east, of course, in some places it would spread both ways, but the volume would be east. I am acquainted with the old Woodburn Building over there,—an old warehouse. That was built I should say, from 1910 to 1912. It was an old building moved [201] from here and put on piling. It was near low ground on the water course, is how it happened to be put on piling. During the times I was here I have observed the bridge at the railroad embankment. I have observed the sides, where the water goes through at the sides; I know where the embankment is—where the water goes through. The embankment was a fill. That fill was composed of dirt fills. Where the water goes through, it is a dirt fill, I think.

(Deposition of J. C. Kinney.)

Q. I don't think it is a dirt fill, but right where the water washes through, did you ever notice any rocks?

A. Yes, the rocks protect it. It was rock riprap. There used to be rock riprap there or boulders. It was on this west side, I know that, I don't recall—I have seen the water extend over there on the Davis Addition where this Woodburn Building is, but whether there was any damage done on the Davis Addition, I don't remember. Naturally, Davis and I were pretty closely associated in business here and I seem to remember him having trouble over there with high water.

I said I was here in 1896 and 1893. During that time I remember one particular severe flood. I believe it was about 1893 in the spring when the spring thaw came and the creek broke up, there was an ice dam and it was pretty close to endangering the town and then the town turned out to help and it was eventually broken up by the section men by throwing joints of dynamite and it was broken up and the ice went through and the town avoided a flood.

When I came here in 1890, I noticed an old swale running down over west. That swale in my judgment, was an old river bed. It was low ground and apparently the old river bed. It connects with the creek back here back of the main part of town, with whatever street that is that runs back and forth, I don't know what street it is. It con-

(Deposition of J. C. Kinney.)

nects with Beaver Creek and runs north, [202] it runs north back of this part of town, Main Street, and it runs right into the railroad bank, I believe. It was that way when I came here. When there was high water, it was always full.

The valley down here by Beaver Creek is largely a rolling plain with evidence of high water and erosion and badlands and other things. During the dry seasons, there is very little water in the creek. Beaver Creek doesn't run constantly, some seasons Beaver Creek is almost dry. The climate here is of a dry nature but we have some extreme heavy floods in this part of the country.

Q. Now, explain how those come?

A. Well, I have seen water rise here——

Q. I mean by that fall of the rain?

A. Yes, it comes down so fast that you can't breathe if you are out in it. It comes down in sheets. The creek at those times comes up very rapidly. When there are heavy downpours, the creek always gets out of its banks, always."

Cross Examination (By Mr. Hall)

(By Mr. Jameson, reading):

"I said I came here in 1890. I was State Senator from this County from 1914 to 1921, that is, I was elected in 1914 and again in 1918. I was a member of the city council here for a period of time but not until eighteen, I don't recall, probably about two years. I think it was earlier than 1912 as I left here in 1915.



(Deposition of J. C. Kinney.)

Q. I think from 1911 to 1915.

A. I don't think so; I might have been, I don't recall just when I was a member of the city council.

Q. I am stating what this memorandum shows. Now, during the time that you lived here from 1890 to 1915, you state that you saw a good many high waters but at any time, not any of those high waters was high enough to run down through Wibaux Street, or Main? [203]

A. No. I spoke of an old channel, evidently an old channel sometime past, west of town here that came down towards the embankment and during the time that I was here that the upper end was filled in. It is a little lower there than Main Street, than it is on the south end of Main Street or Wibaux Street. High water continues to change this channel. It would possibly wash out a little of this bank and the result would be that it makes it a little wider between the banks.

Q. Now, the channel, as I understand it, back in 1890, at some point up where the wagon road is or further south than the present highway or First Avenue South, you spoke about the channel changing there?

A. No, it used to be down where the bridge crossing is, just around where the blacksmith shop was, directly east of the Wibaux Machinery and Auto Company, about a block south of the present one. In 1890, the water came from that point and then a little east and around and then along my

(Deposition of J. C. Kinney.)

property and the Wibaux property. That would be the supposition that it was on account of the high water that Mr. Wibaux put that wall there. The company, I said, dug out the gravel so that the stream coming from where the old highway crosses would run more directly straight to the bridge. And that would have a tendency to keep the water from washing the banks away from these buildings on the east side of Main Street. Of course, that ground between the old channel and the new channel was low ground. As a matter of fact, the valley south of the bridge where the baseball grounds are, it is a couple of feet higher than the channel, so that when the water rises two or three feet, it floods over all that low ground. Any high water would do that. But the fact that low ground was flooded from ordinary high water, that would never flood the buildings here in town. In fact, as you understand it, for a number of years, there was a pond there all the time that covered a number of acres, and that was probably due [204] to the little concrete wall that was constructed for the purpose of making a pond there. That was about three feet high, and as a result of that three-foot wall, north of the railroad bridge, I should say that it backed up water so that there was a pond of about twenty acres, and I had a boat that I used to ride around in; that was there for several years. Since that time, that concrete wall has been taken out. After that, whenever high water would

(Deposition of J. C. Kinney.)

come, it would cover that same flat of ground that was backed up by that three-foot concrete dam.

Q. Was it from that dam that the water backed up, that you said the water would seep into your butcher shop basement?

A. It always seeps into all the basements in town,—in the basements of the buildings where the rear end of the buildings butted into the bank there. We had basements six or eight feet deep; the water would sometimes seep in. As to it ever getting very deep, it would depend upon the duration of the flood, if it held up very long it would get quite deep in the basement. In ordinary times when there was no high water, I would say that the channel of Beaver Creek is only twelve or fifteen feet wide, and of course, this lowground of fifteen to twenty-five acres out south of the bridge, after the high water receded, would be covered with gravel and sand and would be practically worthless ground. I had trouble with water seeping into the basements of other of my buildings besides the butcher shop,—in the bank building and the new brick building. They were all on the east side; that is the rear end of those buildings that were out close to the channel, and the straightening of that channel by the railroad company throwed it further east and relieved the situation to a certain extent, and had a tendency to accelerate the flow of water so there would be less danger in town. The opening at the county bridge was not as large as that of



(Deposition of J. C. Kinney.)

the railroad bridge. This old warehouse, or Woodburn building, I [205] said was moved over to the present site about 1910 or 1912. That warehouse was used for the purpose of merchants unloading their stuff there; they unloaded their stuff from wagons. I think the building platform is on a level with the floor of the building. That building is situated east of Beaver Creek. I recall the water backing up there on the Davis Addition, but I don't recall that there was trouble at the Woodburn building.

This flood that I spoke of, in 1893, that was an ice jam. That ice gorged against the railroad bridge. It was not the county bridge. That old concrete wall wasn't there then, so it was not due to the fact that that old concrete wall was there. It was a case that when the ice went out, it gorged in such a manner that it backed up the water and the section men dynamited the ice and relieved the situation.

I haven't any idea of how long ago this old channel went down there. That channel has changed, no doubt. The nature of the valley here is like that of all eastern Montana. Beaver Creek runs down through the valley some thirty or forty miles with a number of tributaries coming in from all sides, a rolling territory.

Q. And the valley proper or the land is susceptible of plowing or agriculture?

(Deposition of J. C. Kinney.)

A. Yes. I thought Mr. Colton was asking me about the land below, north, there is not much difference, but he asked me about the land below and we called the land below north.

Mr. COLTON: I meant south.

As you go further north you strike the badlands and is mostly grazing country. If a person could get water to it, you could dry-farm it. During all the time I was here when I saw heavy rains and Beaver Creek was flooded and the land south of the track there for fifteen or twenty acres, I never at any time saw water get high enough to come down Main Street. I testified to [206] Mr. Colton's question that I had seen all of the flat country covered with water six or eight times, I mean from the road here to the rise at the stockyards, probably more than a quarter of a mile wide. I mean from the present county bridge to the elevators there, around the elevators. That ground is all several feet lower than the level of Main Street here."

Redirect Examination (By Mr. Colton).

(By Mr. Jameson, reading):

"I wasn't here in 1921 possibly sometime in 1921. I was here in 1929, after the flood. During those high waters that I talked about, that came very close to getting in Wibaux Street.

Q. Tell us how close.

A. Out here—we lived just across from this bank south. We lived across the street in that block.

(Deposition of J. C. Kinney.)

Q. South of First Avenue South, the street that crosses the bridge? On the street that crosses the bridge running by Nick Wagner's store?

A. We lived south of that in the middle of the block. I have seen water within six inches of the bank. That's on Wibaux Street. On the bank east of Wibaux Street, I have seen water nearly to the top of the bank. I should say that was about twelve feet deep. The stream would continue at that point, it would continue to go around to the elevators.

Q. Then during those heavy rains which you testified about, how deep would it be over the flat, I would say from the baseball grounds west to where the creek bank was?

A. Of course, the water varies in depth and then there are swales and low ground, but on the general level of that country, I would say about three feet deep.

Q. You testified on cross-examination that you used to row a boat around there, is that between the county bridge and the railroad embankment?

A. When I rowed the boat there, there was no county bridge. [207]

Q. How deep was the water where you rowed the boat?

A. I would go up the main channel, up one and down the other. I should think that water down here would be nine feet deep. It was that way all the time.



(Deposition of J. C. Kinney.)

Q. You just testified that the water would be about three feet deep?

A. I refer to the deep places. When you come over here by the Wibaux property you find a depression, I didn't mean the water was anything like nine feet deep, I was not able to row the boat except in the channel where we used to go swimming. The water that went through that railroad bridge would have to go over that dam. The water, in order to get into this swale, this one near the bank right there, would have to be extremely high to get into that, it would have to be a foot and a half from the top of the bank or if it came within two feet of the top of the bank, so it required a heavy body of water.

Q. You testified that the water went east, flowing east when it came down by the Wibaux property or between the county bridge and the railroad bridge and flooded those flats at the ball park. You said that the water spread out over the baseball park to the stockyards?

A. Beyond the elevators.

Q. How much higher were the elevators than the bed of the creek?

A. Well, I should think—they had a driveway there—and we have a pit in the elevator, now those pits where the machinery is, are not much higher than the bed of the creek, probably three feet.

Q. How much further east from the elevator?

(Deposition of J. C. Kinney.)

A. About two hundred feet, for the entire creek at that point is possibly not to exceed four or five hundred yards.

I testified that in these ordinary high waters that the water would come down the creek to the embankment and then spread out until it gave way at the opening of the bridge."

Recross Examination (By Mr. Hall).

(By Mr. Jameson, reading): [208]

"As a matter of fact, if there had been no bridge or embankment at all, the heavy rains would cover all this low ground. I said that I was not here at the time of the 1921 flood, and I was not here in 1929. I still had property here in 1929. That was damaged. That is the house I spoke of east of Wibaux Street, the street running east, the present county bridge highway. I have not brought suit against the railroad company.

Q. Now, this bank you spoke of where you have seen water up to six inches to the top of the bank, that is the bank coming along the east side of town here, that is the south and east side, it would be the bank opposite your residence, directly east?

A. We lived here in the middle of the block, I mean the property where Drake's store is, I lived there for some time, and I have seen the water up within six inches of the bank. I spoke that there might have been places nine feet deep when my

(Deposition of J. C. Kinney.)

boat was out there, I mean some unusual depression. But, of course, with the concrete wall only three feet high, it would go over the concrete wall.

Q. And the average level wouldn't be over three feet and as you went up the stream, it would decrease?

A. I think you will find that right under the bridge it is higher than it is here, of course, that is natural. Right under the railroad bridge you will find it higher than this old creek bed here. Of course, these estimates that I make as to the area of this ground and so forth, are just estimates on my part. Of course, I haven't been out in Montana and made estimates at different times; I just looked at it from the alley down here.

(By Mr. Colton): (Mr. Jameson, reading).

Q. You say that in ordinary high water it covers this flat about three feet deep or so?

A. What I tried to explain is that there is a general level, or a mesa and on that mesa as an [209] average, I should judge there would be about three feet, there would be general spots where this mesa was three feet under water, and then there would be spots twelve feet deep. I said the water would cover the entire territory that I refer to even if the embankment wasn't there."

(By Mr. Hall): (Mr. Jameson, reading).

"I have gone down there and made special observations when that water did come. I didn't figure the water was a little lower on this side. It has



(Testimony of John Presthus.)

backed up where it came on above the creek embankment on the west side of the creek.” (Signed by Mr. Kinney and sworn to).

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Mr. McCARTHY: Was plaintiff’s exhibit 22 introduced and received in evidence? It was introduced, I think.

(Mr. McCarthy handing the exhibit to the jury).

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Testimony of

JOHN PRESTHUS,

who had been first duly sworn as a witness in behalf of the plaintiffs at the trial of case No. 2444, Wibaux Realty Company, a corporation (and other cases) vs. Northern Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 9th day of January, 1934, was read at this time by Mr. Maury of counsel for the plaintiff, as follows:

“Direct Examination by Mr. Maury:

“I am the section foreman of the Northern Pacific Railway, at Wibaux; I am located at Hodges at the present time. Hodges is about ten miles west of Wibaux. I have been section foreman at Wibaux

(Testimony of John Presthus.)

since 1910,—23 years; was transferred to Hodges the first of December, 1933—just about a month and four or five days ago. I was in Wibaux on June 7, 1929, the day of the flood there. My house that I lived in with my family was located [210] just north of the Northern Pacific depot there, about 100 foot. The house that you are pointing to on the model is the house where I lived in June, 1929,—(this is the depot over here). (The house is immediately north of the depot across the track).

On that day water got up on the kitchen floor in the section house. It was just about one inch up on the floor, on the north end of the house.

Q. How deep was the water just across on the south side, at its deepest, Mr. Presthus? South side of the embankment at the railway?

Mr. McCARTHY: At what place?

Q. Opposite your house?

A. I should judge about ten feet.

Mr. MAURY: Do you wish any further of the deposition?

Mr. McCARTHY: No, I don't think so. That is, I reserve the right to look it over.

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Testimony of

TOM LEHIN,

who had been first duly sworn as a witness in behalf of the plaintiffs at the trial of case No. 2438, J. R. Bailey, et al., (and other cases) vs. Northern

(Testimony of Tom Lehin.)

Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 27th day of September, 1933, was read at this time by Mr. Maury of counsel for the plaintiff, as follows:

—  
“Direct Examination by Mr. Colton:

“My name is Tom Lehin; live six miles west of Wibaux. I lived in Wibaux part of the time during the years 1896, 1897 and 1898. I worked for the Northern Pacific Railway Company at Wibaux, in '97 and part of '98; all of 1897 and 1898; was working on the section at that time. During the time I was working for the Northern Pacific on the section I observed storms at Wibaux in the Beaver Creek valley. [211]

Q. Just describe to the court and jury in your own words—take your time—what the nature of that storm was?

Mr. McCARTHY: Can you make it a little more definite?

Mr. COLTON: 1897.

It was no storm; it was just a break-up in the spring, and I started to work on the railroad about the first day of April, 1897, and that was an awful late spring that year and it didn't break up before about the first of April, and at that time it was quite a big flood in Wibaux coming down the Beaver Creek there, and at that time I was work-



(Testimony of Tom Lehin.)

ing on the section, and at that time, I don't know just exactly what date it was, but it was in the first week of April the creek come up so high that the water come over towards the railroad track on the east side of town—on the west side of town I mean. It come over down towards the track and then down towards the bridge again. Explaining more clearly what part of town it came over and where it come from: at that time it was west of town where the water comes down toward the railroad track.

As to whether there was an old swale on the west end of town at that time,—it was rough there anyway; I don't know whether any swale or not, but it was always rough there. That was west of Wibaux Street—west of the Main Street; and the water came down there. When the water came to the embankment on the west side of town, it went east towards the creek then—it went east towards the railroad bridge then. I could not tell you how deep the water was there, because at that time I didn't pay very much attention to it. Some water was coming down from the hills and part of it was coming out of the creek there. Naturally, it would come some from the cemetery hill and part of it was coming from the real Beaver. As to where it came from the Beaver—what part of town—well, I call it just straight south, not quite south, of the Catholic Church, but pretty near south of

(Testimony of Tom Lehin.)

the [212] Catholic church. That was near the water tower—where the water tower is now; that is where it came over. I couldn't say for sure now how much water came over there, but I should judge something between two and a half or three feet, it was coming across the track there.

A. After that flood, did you as a section man help make any improvements there?

Mr. McCARTHY: Objected to as immaterial, if the Court please.

Q. What, if anything, was done after the flood—you section men——

A. At that time, the track wasn't laying on a very high dump then and Main Street went right over where the viaduct is now.

Q. What, if anything, did you do about the viaduct?

A. After that flood, we got a job putting in a little culvert there, that went east and west along the railroad track there, where the viaduct is now."

"Cross Examination by Mr. McCarthy:"

(Mr. McCarthy, reading):

"In 1897 there was some water got down in Wibaux. It didn't come up south of the railroad track very far,—it comes from the south all right, but at that time, it was on the west side of town—to the west of Wibaux and just beyond the city limits. What you would mention as the city limits, there is a hill. The hill gets pretty high there; it is what they call the cemetery hill. North of the

(Testimony of Tom Lehin.)

cemetery hill there is the Wibaux monument; the cemetery hill is south of the Wibaux monument, and a little west, and of course, if it rained good and heavy—if it rained heavy over on that cemetery hill, the water ran down into the town.”

“Redirect Examination by Mr. Colton”:

(Mr. McCarthy, reading):

“It didn’t rain any in that flood, up on the hill; it [213] was just the water going off in the spring. I don’t know how much ground there is west of the swale and up towards Pierre Wibaux’s statue; I should judge 300 acres, not over 400 acres anyway. It is not so very many blocks from the swale up to Pierre Wibaux’s statue, probably three blocks; at most, four; and that hill is about that wide too.”

“Recross Examination by Mr. McCarthy”:

(Mr. McCarthy, reading):

“I couldn’t say whether the hill has got somewhere between 300 and 400 acres on it,—well, within 100 acres. It snowed during the winter of 1896 and early part of 1897. Part of the cemetery hill was covered with snow and ice during the winter—well, there was some there you know; of course, it blows off there you see. The snow that was there, when it got warm and melted, the water forming from the snow would run off like the rain water, but it wouldn’t take long to run off. When it melted and run off, it would make a lot of water.”



R. A. LYMAN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

Mr. MAURY: We offer in evidence defendant's exhibit Y-15 from another trial,—cross section at Brophy's.

Mr. McCARTHY: No objection. May I suggest: here is another exhibit.

Mr. MAURY: Yes; plaintiff's exhibit X-5 is now offered in evidence, chiefly for bridge and filling under bridge.

My profession is civil engineer. I graduated from Iowa State College, Ames, in 1907. I had quite a little experience before that in minor capacities in Iowa and Colorado,—in all capacities [214] probably, from chainman to engineer, all kinds railroad maintenance, construction and maintenance. After graduation, I went to the Des Moines City Railway as engineer, and later, assistant chief engineer on maintenance. Then I came to Montana and located near Wibaux for a while and later, near Baker; and in 1912 I went to Cuba as assistant engineer with the Guantanamo and Western Railway, six months later was made chief engineer, served as chief engineer for three and a half years, and practically, it was a construction job and later, maintenance. In 1916 I went with the Cuba Cane and Sugar Corporation,—engineer was my title. I had

(Testimony of R. A. Lyman.)

railroad location and sugar factory construction. In 1918 I came back to Montana and engaged in private engineering practice; about three years land classification; I was county surveyor during all the time in Fallon County, and ranching. In 1925 I went to Colombia, South America on railroad construction, and in the fall of 1926 I returned to Montana again and since, ranching and private engineering practice, and county commissioner of Fallon County,—I still am county commissioner. And right at present, I am field engineer for the “C.W.A.” out at Missoula.

I was called in the year 1931 to examine a condition at Wibaux and to determine, if possible, the cause of a certain flood that took place there in 1929,—June 7th,—I was employed by yourself and Mr. Colton to make a study of the situation there. I found, or was shown, a great many high-water marks of the 1929 flood; also quite a few of the 1921 flood. I measured the elevations of these high-water marks; took various—I think it was four—cross-sections of the creek; took a great many elevations of floors of buildings, streets, roads, bridges; measured and examined the railroad bridge as now exists, and the remains of a bridge that had existed before the flood; also the remains of a concrete dam just immediately below the railroad bridge; the present viaduct over Wibaux Street. I calculated the [215] drainage area of Beaver Creek, measured the slope of the valley, and studied it in a general

(Testimony of R. A. Lyman.)

way. As to what correspondence in the nature of a table of water I found as to the water marks of those respective floods,—I think I know what you mean,—will say that all that portion in town south of the railroad track was covered by a comparatively level lake of water, if you might call it that. It was remarkably consistent, the elevations, only a very slight rise as you went upstream or south, level transversely. By “transversely”, I mean east and west, or parallel with the railroad. Now, I would like to interrupt a minute: At all these trials this question has come up about this datum. What do you wish me to refer to?

Q. I wish you first, to tell how you arrived at your own conclusion as to the cause. Explain to the court and jury. I believe that will be the fastest way to get at it.

A. As I say, I found that the entire south portion of town,—the portion west of the creek and perhaps half of the Davis Addition had been covered with water at a certain depth, and that north of the railroad embankment, downstream, and east of the creek, the water was from ten to thirteen feet lower than it was on the south side and west of the creek, and north of the embankment there was a difference of between six and seven feet between the south side and north side of the embankment. As to what causes I expected at first might have brought that about,—well, I studied to see what possible causes there could be when a



(Testimony of R. A. Lyman.)

sudden variation takes place in an elevation of water in a flowing stream, practically the only two physical—the condition of the stream itself in its valley, would be a very sudden widening of the channel or valley or a very sudden increase in the drop or slope of the stream. That was the reason I took three sections in town. I made an independent survey in the region of Massey's house. I was going to go further: there was three sections I [216] took to determine the width of the valley and the water covered by it. I made one section parallel with the railroad about 100 feet south of the main line in the railroad right-of-way, extending from high-water mark on the east side of the creek to or beyond high-water mark on the west side of the creek. As to the length of that section, I can't tell you. I have the notes from which it was made, but I think 2600 feet approximately. Then I made another section on what is called First Avenue South, also parallel with the railroad, which I believe was 2400 feet long; that was from high-water mark to high-water mark. Then I took a section through a portion of the town north of the track. That I ran on a diagonal course with the object of making it at right angles to the creek opposite where the bend is shown there, and that section was I believe 2100 feet,—at least, considerably shorter than the other two, even assuming the water to be the same height, which it was not. It actually, from high-water mark to high-water mark was about 1400 feet, I believe,

(Testimony of R. A. Lyman.)

and I checked the slope of the valley and I found no appreciable difference in the slope. So, the only two possible causes which might exist did not, and would only leave the railroad embankment as the cause of that extreme difference.

The width from high-water mark to high-water mark at Massey's place was 600 feet. It did not include that water to the east of Massey's house, that was a comparatively trifling stream. If you wish it, I will give you an explanation of how that was there,—how that got there: As the relief map shows, there was a sharp bend in the creek, and at the time of the flood, as I understand, it was even sharper than shows on this relief map; at any rate, there is a sharp bend there—more than a right angle—the flood stage had put this water up practically to this bank, and what you call the energy of the water, would simply lift it, splash over it, in other words,—rather than make the sharp bend, it [217] would splash over. As near as I can tell, it had gone down there in a sheet a foot or——.

The depth of the water at Massey's on June 7, 1929, in the main channel of the creek was practically 11 feet I think; that is from actual measurements. In taking the measurement of the depth of a thing like that, that is what we call taking levels and simply comparing one point with another, an arbitrary bench mark as we call it.

Q. I know, but do you use the level of low water in the stream or do you use some hole in the ground? For the creek channel?

(Testimony of R. A. Lyman.)

A. Perhaps, I would take the level of the hole in the ground, but I wouldn't call that part of the creek channel. As to what I base my measurement of 11 feet there from, will state that in my particular case, they practically coincided—there was only one inch or so; it was a very trickling stream there; they would be the same. The valley sloping up from the thread of the stream or the high water there,—the condition was that it was practically a curving channel, saucer-shaped channel; there was very little of any one depth. Pointing out on the profile here about where my cross-section of 600 feet from high-water mark to high-water mark went, I presume it was right across there (witness indicating a line running more or less north and south from the nearest portion of his barn).

One of my cross sections is right by Nick Wagner's place, in the street. The length of that cross section from high-water on the west to high-water on the east was 2400 feet I believe. In regard to the height of the ground at Massey's house above the level of the stream or the bottom of the stream at low-water, I have some notes here (referring to notes),—I have the ground at Massey's house  $24\frac{1}{2}$  feet above the extreme bottom of the creek.

Q. Under the bridge or where?

A. Pardon me. That is referred to the bridge down here. I think I have it the other way too.

[218]



(Testimony of John Oien.)

Mr. MAURY: We would like to place Mr. Oien on the stand for a few questions and we will shorten the case I think.

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JOHN OIEN,

being first duly sworn as a witness in behalf of the plaintiff, testified:

Direct Examination:

(By Mr. Maury).

I am an engineer in the employ of the Northern Pacific Railway Company. I have been in their employ almost 29 years and I am working on the Yellowstone Division; that embraces Wibaux. Soon after June 7, 1929, I went to work at Wibaux for the company. I took certain high-water marks. At that time, they were apparent on the land from the railway fill south as far as Brophy's place. The first place above town is Massey's. I think there is another place in between Massey's and Burke's; Burke's is south of Massey's anyway; then south of Burke's is Parker's, and south of Parker's is Brophy's. Brophy's is about five miles from the fill, straight.

At Brophy's, I took data for this cross-section which you are showing me, and I took data for the high-water marks of 1921 and the high-water marks for 1929; the yellow color represents the high-water marks of 1921 and the green that of 1929. As to the distance across the valley the high

(Testimony of John Oien.)

water extended in 1921, I would have to measure (this is Y-15 the exhibit of the defendant in the former trial, in January, 1934, that has been offered in this case). It was about 1200 feet in 1921. There is a little yellow over there (indicating) about 80 feet. Apparently, the river was out of its banks in 1921. The water was 3.3 deeper in 1929 at Brophy's than in 1921; that was in midstream and all across. The height of the water in 1921 in the deepest part of the channel was 13 or 14 feet.

I made another cross section at Burke's place for 1929. I [219] don't recall the length of it. I haven't the notes with me. I will have them here for you tomorrow morning.

Q. I call to your attention testimony at the bottom of page 536 (Transcript on Appeal, Case No. 2438, Bailey, et al., and other cases, vs. Northern Pacific Ry. Co., tried at Baker, Montana, in September and October, 1933), could you from that, tell us how wide the water was in June of 1929, at Burke's place, immediately above Massey's, or possibly not immediately,—there may be a place between?

A. Yes; the deepest water at Burke's place was 17.4 feet and the water was 420 feet wide there.

Mr. Lyman and I have often compared measurements and elevations, in court.

Q. Now, there is a difference between your elevations and his of two feet, is there not? I mean of the survey around Wibaux?

(Testimony of John Oien.)

Mr. HALL: 26 feet isn't it?

A. 26 feet, yes.

Q. Is there a difference of two feet between your measurements from under the bridge, and his?

A. From under the bridge, yes. Whatever he says is—for instance, 13 feet above the point under the bridge, if it is around Wibaux here, would according to my measurements, be 15 feet. The reason for that, I presume, is that we took the sections at different times—different years. I took the elevation under the bridge pretty soon,—a couple months—after the flood of June 7, 1929. It is possible that the bed had raised some in two years afterwards. When I measured for the depth of the water at Massey's place, I took the elevation of the creek-bottom and also the water-level at that time. I don't remember,—I couldn't tell offhand how close a correspondence I got between the two; I will have that here for you in the morning; will bring my notes up tomorrow morning on the entire survey; will also produce that cross section of Burke's, that has been reduced to a cross-section plat. [220]

I have a cross section a half a mile north of Mr. Brophy's place; I made a cross-section there on the highway,—on the east-and-west highway. I will produce that in the morning.

Q. Have you got cross sections showing depth of stream from Brophy's down to town?

A. A profile you mean?

Q. Showing the depth of stream—width,—width as well as depth?



(Testimony of John Oien.)

A. At certain points I have that. The cross sections show that. I will bring them all up here tomorrow morning.

Cross Examination:

(By Mr. McCarthy).

So that we get it clear, a cross-section, that we have been talking about here, is a drawing you might say, showing the elevations of different points along a certain line. Supposing there was some water here in the courtroom and I found that the high mark of the water on this wall was up to the seat of this gentleman's chair (No. 12), I would expect the water would be level, and I would get the high mark on the other side of the wall that it came to and those would be the limits of the water. Of course, on the ground where there are various slopes, I get the extreme, if I take a cross-section there that runs north and south, I get the mark to the west and the mark to the east, of the high water, and the bottom line of the so-called cross-section is the ground-line and the top line is the water-line; it is really a theoretical slice out of the ground and the water. Now, on this exhibit—this cross section taken at Brophy's place—showing the court and jury where the high water in 1929 extended from and to,—it extended from this point on the east to this point here on the west. Showing where the 1921 high-water was,—where there was any water in the vicinity of Brophy's cor-

(Testimony of R. A. Lyman.)

responding to the same cross-section, in 1921, it was from this point on the east to this point on the west, and a small portion at the other end. [221]

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R. A. LYMAN,

recalled for further direct examination, by Mr. Maury:

Q. Mr. Lyman, I believe I asked you what the elevation at Massey's house—I mean the ground right at Massey's house—was above the bed of the stream, right opposite his house? (witness figuring). By bed of stream I mean level of water at low water?

A. I get it just 14 feet.

Mr. McCARTHY: Where is the 14 feet you are referring to?

A. The ground at Massey's house is 14 feet higher than low water in the creek right opposite his house.

When I examined or measured it, there was practically no water there; the bottom of the creek and the channel coincided practically, just trickling through the pebbles.

Q. We have referred in previous trials as the point B being the point under the Northern Pacific Railway Company bridge. How high above the point B is the land at Nick Wagner's?

A. Mr. Maury, I am going to suggest that I used Mr.—the two-foot difference as explained by

(Testimony of R. A. Lyman.)

Mr. Oien, so there is no confusion,—it amounts to the same thing,—and I am going to add two feet to all my readings to make them coincide with Mr. Oien's. I am sure there had been a fill between June 7, 1929, and the two years afterwards that I got there; I am sure Mr. Oien did it right; it wasn't anything complicated to get, so I know he must have had a deeper place to measure than I did. His information being closer to the time, the starting point would be better than mine, to take it, so there would be no confusion.

The land at Wagner's place of business at the corner of First Avenue South and Main Street, is just 15 feet higher than the point B. I have seen an exhibit and diagram of the county bridge as it existed there as prepared by the railway company.

Valleys are formed, the stream in almost all cases forms its own valley in the course of years. As to what relation the [222] size of the watershed has to the size of a bridge over a particular stream and the requirements of the bridge, generally speaking, it bears direct relation—the bigger the watershed, the bigger the bridge. A great many formulas have been devolved for that, taking in that and other features. The railroad company's bridge as it existed there on June 7, 1929, consisted of one 70-foot span with two approach spans of 20 feet. The approach spans had been filled on a slope down from the top of the abutment to the base of the pier, leaving a clear waterway of about 65 feet between



(Testimony of R. A. Lyman.)

piers, plus a triangle under each approach span as the water got high.

Q. How high were the banks, as close as you could judge from your examination on the ground?

A. The banks at that place are hard to define. The east bank is very high and steep. The west bank, it is harder to say exactly,—“Here is the bank”, but I would say as near as you could get at such a thing,—six feet maybe would catch the—I don’t know—I would rather see that profile that was introduced, if you wish me to testify to that.

Mr. MAURY: We offer in evidence this exhibit (plaintiff’s 26), from the other case.

Mr. McCARTHY: I have no objection to Mr. Lyman referring to it, but owing to the confusion between the horizontal and the vertical scale,—I object to it on account of the confusion.

Mr. MAURY: We offer it in evidence.

The COURT: Very well.

Mr. McCARTHY: It would be very confusing to anyone but an engineer and we object to it for that reason.

Mr. MAURY: I think the jury can understand it with the explanation.

The COURT: I think the jury can understand it. Overrule the objection. [223]

A. I might suggest, Mr. Maury, if you will give me the width of the stream for any height, I could get at it in a better way.

(Testimony of R. A. Lyman.)

Q. Can you tell from that profile how wide it was between the banks of the stream at the bridge when that profile was made?

A. You would have to specify in that question what you mean by the banks; the banks of the creek at different heights, would be a difference, or a flow of so much water to catch the banks. To get anything like a flood flow, the banks are about 600 feet wide at this point. About a 10 or 11-foot flow would show banks of 600 feet wide in the banks at the time the profile was made. I don't notice any difference between the profile that I have here and what has been called the relief model here at the bridge; I think they coincide pretty well, as near as such a map could be made.

Q. Will you examine and see if from the profile there, whether the banks of the stream correspond with it—whether the east bank corresponds with the profile?

A. No; I see what you mean; there is quite a little difference there. The profile indicates that the east bank of the stream, which was well defined, was probably 200 feet east of the east end of the bridge.

Q. And how as to the west bank?

A. I would like to modify that first. It is about 400 feet on the west, from the west abutment of the bridge to the first pronounced bank and only about 100 feet on the east side rather than 200, which I just said.

(Testimony of R. A. Lyman.)

I found the nubs of an old dam here on the ground. They correspond with the bridge, in feet, on the ground,—the east end of the dam is about 50 feet east of the east abutment of the bridge; that would be 70 feet from the east pier. The west side of the dam corresponds with the bridge very well, (referring to notes); the west end of the dam—the remains of the dam—show it to be about 8 feet west of the west abutment of the bridge, and that would be approximately 28 feet west of the west pier. By [224] “piers”, I speak of the two inside columns of support; “abutments”, I mean the extreme supports.

I have lived above Wibaux in the Beaver Creek valley about 20 miles. Describing what kind of a country that is for storms, it is a so-called semi-arid country, fairly high altitude,—the type of country that we know is subject to violent storms. I have seen some of those storms. There is no regularity at all with which streams get out of their banks there; they frequently do,—sometimes the melting of the winter’s snow and sometimes, if it rains, it is pretty apt to be in May or June, and sometimes in the fall. The river there above Wibaux is probably 50 miles long without counting meanders. As to meandering it is a very crooked stream; probably the length as measured along the stream itself would be perhaps, nearly twice as long as the distance measured right straight up the valley, perhaps not quite that much, but nearly twice I would



(Testimony of R. A. Lyman.)

say. That contour and the course of the stream exists for 30 miles, in a general sense, along the stream from Wibaux all the way up; I don't believe it is as crooked after the first 30 miles from Wibaux up; from Wibaux, up 30 miles, I believe it is about the same character as at Wibaux; from that point on to the head it is perhaps not so crooked.

I have an elevation of the lowest point of the stockyards spoken of in the Kinney deposition; the stockyards sit on a hill and I took the lowest point down the hill to which the stockyards reached. That is 22.1 feet above the point B.

I have the elevations along the roadway from the county bridge to the elevators. Along that county road there, I said at a previous trial that I believe the model doesn't show quite the dip that actually exists there; it would be hard on a small scale, to check it up.

Mr. MAURY: We offer in evidence this exhibit Y-4. It is a cross section offered by the defendant at another [225] trial, "Profile First Avenue South, Wibaux, Montana."

Q. Can you tell us from that Mr. Lyman, the area of water, or area for water, that the old county bridge gave? The one that was there on June 7, 1929?

A. Yes, sir; up to the——

Mr. HALL: It was taken after 1929 wasn't it?

(Testimony of R. A. Lyman.)

A. It shows the bridge as existed previous to the flood—washed out,—they have it marked here as an area of 920 square feet.

Q. And what other escapement for water appears? How much appears there?

A. East of there, they have an area—these areas are for the 1929 flood,—is that what you wish?

Q. I wish the top of the bridge area and a level running to the east from the top of the bridge,—what was the entire area that water could escape through there?

A. Without going over the bridge?

Q. Without going over the old county bridge?

A. They have it marked, the sum of 920 and 2230,—it would be 3150 feet.

Q. How does that correspond with the area for water to go through the old railroad bridge that existed there on June 7, 1929?

Mr. McCARTHY: That is objected to, if the Court please. If he wants to compare the area under the county bridge with the area under the railroad bridge, there is no objection. Now, he proposes to go outside of the county bridge, and taking in the possibility of an overflow and compare the possible overflow of the area of the county bridge with the area of the railroad bridge. If you will compare the area under the county bridge with the area under the railroad bridge, there is no objection. This is not a proper comparison.

The COURT: I don't know if that is his object altogether.

(Testimony of R. A. Lyman.)

Mr. MAURY: No, sir; it is to show the provision that others made for water there.

The COURT: On account of the height of the roadway you mean, and the height of the bridge?  
[226]

Mr. MAURY: Yes, sir,—the proof that in high water, the water flowed around the county bridge over that area.

The COURT: I will overrule the objection. You may show it.

Mr. McCARTHY: Note an exception.

A. At the same flood stage, corresponding water, there is an elevation (area) at the railroad bridge of 810 plus a little—I couldn't say how much it would be—those two triangles—as against 3150 at the county bridge and east of the county bridge; about one-fourth.

I never saw the viaduct so called, as it existed before the flood; I seen it as it exists now. The floor of the viaduct is 11 feet above the point B. It has been testified to how much space for the flow of water existed through that viaduct, but I don't remember it. No part of the flood of 1929 got up as high as the so-called children's viaduct.

I have elevations on the water-level north of the fill. I took elevations of high-water marks at the community church. I took the elevation of the section-house floor, which is practically a high-water mark as testified to by the section foreman. I have those close on the west side of the creek. I have



(Testimony of R. A. Lyman.)

the high-water mark at the tourist camp, or Lentz's house, on the east side of the creek. The floor of the section house is 5.7 feet lower than the high-water mark immediately south of the railroad embankment.

Mr. HALL: What is the elevation of the section-house floor?

A. How do you wish it? Your datum?

Mr. McCARTHY: Sea-level datum?

Mr. HALL: Point B on your corrected datum?

A. 14.2 above point B.

Mr. McCARTHY: Q. While you are at it, what is the highest elevation that you found of water on the south side of the embankment?

A. I got it gradually higher [227] as you go up the creek.

Q. I mean right at the embankment,—the railroad bridge itself, what was the——

A. I have none close. I have them all in the business portion of the town; I have one which is identical.

Q. There is none at the embankment itself, or at the railroad bridge?

A. No, sir.

Returning now to the north side, the mark at the section house would be 14.2 feet above point B, and the high-water mark at the church was 14 feet above point B. The high-water mark in 1929 at Lentz's place was 8½ feet above point B. Lentz's place is not on the map; I believe it is something like 800

(Testimony of R. A. Lyman.)

feet north of the railway fill; it is in line with what would be the next street here reduced, perhaps three inches off of the edge of the map.

Pointing out on the map the outlines as they appear on the ground, of what has been spoken of in the evidence as the slough or the swale, it is as has been described, I think, an old river channel. The old channel leaves the present channel somewhere near and east of the water tank, about here (pointing), being four inches east of the water tower; then it goes due north by a very meandering course due to the intersection with the railway embankment, and carrying on in the same condition, on north, and intersecting with the creek below town probably half a mile north of—When one stands up on the railroad at a point about opposite the Orgain house, the outlines of the slough are visible both north and south. There has never been any culvert at the slough so far as I ever knew, and none exists there now; and none existed there in 1931 when I first examined it.

I don't think I took an elevation of the sidewalk here above the flat (Beaver Street sidewalk). I would say its height above the flat is five or six feet on an average, probably eight or [228] nine feet at the deepest part. It was up on piles, and so that water can go under it. The width of that low place there on the profile on the land, measured along First Avenue South, is about 600 feet.

(Testimony of R. A. Lyman.)

The purpose of riprapping in railroad work is that it is protection to a fill—protection from erosion—and when it is used close to a bridge or stream, its purpose is to protect the bank or whatever bank,—fill, or whatever it is placed on,—to protect it from running water.

Q. Returning to the subject of formulas, do you know of any formula in any engineering work, having in mind the width, the size of that valley, the character of the soil, its barrenness, and its declension, which that bridge of 65 feet or a little more, that you have described, lived up to?

Mr. McCARTHY: Objected to, if the Court please, as not being a proper hypothetical question if he doesn't know.

The COURT: Well, if the witness understands it——

Mr. McCARTHY: He hasn't yet shown us any formulas that he claims exists, or anything of that kind; no foundation laid. If the Court will understand our position, we contend there are no formulas for bridge openings; there are formulas for culverts; there are no formulas for engineers, in the construction of a bridge.

The COURT: I don't know; it seems to me that in order to find out, you ought to formulate some question taking in a little more definitely the conditions that exist there.

Q. Yes. Mr. Lyman, are formulas found in engineering books,—treatises that the engineers study,



(Testimony of R. A. Lyman.)

indicating a correspondence of some kind between a bridge opening and a watershed?

A. There are a great many such formulas in a great many different books.

Q. Have you examined some of those formulas with reference to the [229] size of that bridge and this watershed?

A. I have computed the flow of water or the size of bridge opening, from perhaps eight or ten different formulas, according to the manner in which they should be used. Naming some of those formulas, I only have three of them here I believe; Dickens' formula is one. Do you wish me to give the formulas as I read them?

Q. Yes. What size bridge opening would Dickens' formula require in that watershed?

A. Using Dickens' formula in the way it is recommended by the author, would indicate a flow of water to be expected at 23,700 cubic feet per second. Formula by Ryves,—I don't know how it is pronounced——

Mr. McCARTHY: We have no objection to his authenticating Dickens' formula and then tell us that he applied that formula. I never heard of Dickens; the engineers tell me they never did either.

The COURT: Identify Mr. Dickens, tell us who he was.

Mr. McCARTHY: We object at this time as an attempt to inject hearsay testimony before the jury.

The COURT: You can bring that out on proper examination in detail.

(Testimony of R. A. Lyman.)

Mr. McCARTHY: The objection is, no foundation laid and an attempt to introduce hearsay testimony.

The COURT: And quoting some known authority in the engineering world.

Mr. McCARTHY: The objection is there is no foundation laid and an attempt to inject hearsay testimony in the case.

The COURT: I think you should lay some foundation showing who the author is.

Mr. MAURY: We laid that foundation. We asked if there were formulas placed before the profession, or treatises——

The COURT: Well, what is this treatise by Dickens?

Mr. McCARTHY: If they will tell us who Dickens was and what [230] his formula was, we have no objection.

The COURT: Well, proceed with your formula; I think he has the work there.

A. This is a work by Wilson on Irrigation, in which he quotes many formulas. I have heard of Dickens' formula many times before. Wilson is a recognized irrigation authority I think.

Mr. MAURY: Of course, in Lagrange we were referred to Pythagoras; we were given several good formulas on geometry; we couldn't tell you anything about Euclid's reputation.

The COURT: Proceed.

A. Do you care to have me read?

(Testimony of R. A. Lyman.)

Q. Yes.

A. "D equals C times the fourth root of the cube of M, in which formula D equals the flow to be expected in cubic feet per second. M equals the drainage area in square miles, and C equals a constant, which depends on the character of the country, ranging from 200 for a flat country to 300 for a mountainous country," and I used a value, ranging from 200 in flat country, for a maximum of 350—I used 300, giving a result of 23,700 cubic feet per second,—flow to be expected. Formula by Col. Ryves, derived from study of rivers in India, give "D equals C times the cube root of the square of M," where the letters represent the same thing as in Dickens, with the coefficient varying from 400 to 650. I used 600.

Mr. McCARTHY: We ask that the reference to the Ryves formula be stricken there. He says it is based on studies made in India.

Mr. MAURY: Euclid made all his studies in Greece.

Mr. McCARTHY: Note an exception please, to the declination to strike.

Another formula used was that of Mr. J. T. Fanning. His was found [231] from study of the flood discharges of various American streams. His formula was that "D equals 200 times the sixth root of the fifth power of M." By that formula you would expect 25,800 cubic feet per second; Dickens' 27,800; Ryves 29,400. Two years ago I tried various



(Testimony of R. A. Lyman.)

other formulas, but I can't give the figures on them. I tried Talbot's formula; I can't give the names of others.

Mr. McCARTHY: Myer's?

A. Myer's formula, yes.

I have calculated, using partly Mr. Oien's data comparing it with my own, the maximum flow of water by Massey's on June 7, 1929,—at the previous trial computed that the flow past Massey's was 15,813 feet—call it 16,000 cubic feet per second.

Q. That was the maximum according to your computations and from data of your own and Mr. Oien's?

A. That was based on cross-sections which I took, my own idea as to the constant and Mr. Oien's data as to the slope of the stream.

Q. Have you been able to find any formula that would indicate that a bridge there at the time before June 7, 1929, would carry what would be expected——

A. There was one formula I think, it was Myer's I think it was a low coefficient, showed the bridge to be sufficient. No other formula came anywhere near to it. I believe it was Myer's. By using a low coefficient, showed it to be near ample, but no other formula. I don't even remember Myer's formula now; I can dig it up. We do have coefficients, of course, to take care of the type of the country.

Q. How much water should have been expected by an engineer to flow past that bridge even with-

(Testimony of R. A. Lyman.)

out any previous history of the stream, in your opinion, knowing of the size of the watershed and the character of it?

A. That is a little difficult question to ask. If you are going only by formulas, the bulk of them would indicate from 25,000 [232] on up. I have one, another that 100,00 cubic feet per second should be expected. I shouldn't say that an engineer should use formulas, if he has other data. If you want to be perfectly safe, use the one which indicated the maximum. If all formulas indicated more than previous floods, I would give them the weight.

I have seen the record introduced at a former trial by the Northern Pacific—I saw the exhibit—where in 1900 the high-water mark was shown to have struck the girders of the bridge. As to how high that would be above the bed of the stream, it would be approximately 15 feet up.

Mr. McCARTHY: The record would be the best evidence on that.

A. 13 feet I guess.

Q. If that had continued at that height for any length of time or for a sufficient length of time, what would have happened to the town of Wibaux in 1900—where it struck the girders——

Mr. McCARTHY: Objected to on the ground no foundation laid. The record is not here in evidence.

The COURT: Yes; we don't know much about the town of Wibaux in 1900.

(Testimony of R. A. Lyman.)

Mr. HALL: It wouldn't even reach the town, the witness testified 15.2.

There would undoubtedly be a complete closing if the water struck the girders. The distance from the ties down to the bottom of the girders, as it existed there, and the kind,—it was a steel I-beam girder, and I think seven feet; I believe that was the testimony. I have seen it, in another structure, in another place; it forms part of the present structure, but not the part over the main stream. From tie to bottom of girders it is about seven feet I think. It is solid steel—what you call a deck-plate girder,—

Q. Without openings for water?

A. No opening. [233]

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JOHN OIEN,

recalled for further direct examination, by Mr. Maury:

I have a cross section that I made to the north of Brophy's. This is the first cross section to the north of Brophy's, coming towards town.

Mr. McCARTHY: We join in the offer. It is one of our exhibits in advance, that is all. (Marked plaintiff's exhibit P-6).

That cross section shows the high-water line, 1929. It doesn't show for 1921 or anything about that. It shows a bridge; the bridge is about 140



(Testimony of John Oien.)

feet long. That bridge was not washed out when I saw it soon after June 7, 1929. I haven't got it figured out the number of square feet of aperture under the bridge itself, but my lines are correctly drawn so that it could be scaled. It was 20.5 at the deepest point in the channel June 7, 1929,—on this cross section; it was just one point. From there it slopes right up on each side. I would say there was a deep part or channel of approximately 60 or 65 feet there; the width of the water was approximately 2825 feet,—somewhere around there, I can't say exactly. In the deep part of the channel at high water, of course, the water would be moving rapidly, and moving more slowly as it got to the edges.

Q. And would there be an appreciable change in the velocity of the current just as it left the ordinary high-water channel?

A. I believe so.

Q. And that is what causes in nature a sediment or embankment right close to a stream, isn't it?

A. Yes.

Q. And that is why the Mississippi, or any other great river, elevates itself above the sides?

Mr. McCARTHY: Objected to; we don't want to "try" the Mississippi River.

Mr. MAURY: I spoke of all streams. [234]

The COURT: He cited that as a very well known example, I suppose. Proceed.

(Testimony of John Oien.)

Q. Is that the reason, Mr. Oien?

A. I believe so; yes, sir. That is the cause of the change of the velocity of the water right at the edge of the channel.

Going north towards town, I have a cross section at Mr. Burke's place two and a half miles south of Wibaux. The legend on this and in fact, on all of these is correct as far as it goes,—as to what it is; and these exhibits may be examined by one with the legend and may understand, of course, that that is correct. I made it myself.

Mr. McCARTHY: We offer in evidence this cross section at Burke's.

Mr. MAURY: We join in the offer.

The COURT: It may be received in evidence.

(Cross section marked plaintiff's exhibit P-7)

The water at Burke's was about 420 feet wide on June 7, 1929.

Q. How deep was it at the deepest point?

Mr. McCARTHY: I might say, Mr. Maury, I think you asked Mr. Oien yesterday to bring a statement of the various widths and depths.

Mr. MAURY: Surely; have you got that there?

Mr. McCARTHY: We have got it. We might as well have it marked and put in evidence now.

A. 19.4 feet.

I can tell you approximately how high the ground level was at Burke's house; the elevation was about 2673.8.

(Testimony of John Oien.)

These figures on this paper which you are showing me were made under my direction and checked by me.

Mr. MAURY: And we are going to have it identified as soon as the witness reads it and explains what it is.

Q. Mr. Oien, read it to the—— [235]

A. It is the distance from one high-water line to another high-water line, across the valley and the depth of the stream at the deepest point. "Section 1 Brophy's Ranch, 3 miles south of Wibaux"

Q. I thought that was 6.

A. That is wrong; it should be 5 miles. "The width 2795 feet; maximum depth 16.7."

Mr. McCARTHY: By 16.7 you mean 16 feet and seven-tenths of a foot.

A. "Section 3, 4½ miles south of Wibaux, width 2825 feet, maximum depth 20.5 feet; section 4, 3 miles south of Wibaux, width 1790 feet, maximum depth 19.8 feet; section 5, 2 miles south of Wibaux, 2195 feet width, maximum depth 17.1 feet; section 5A, 1½ miles south of Wibaux, width 2402 feet, maximum depth 14.9 feet; section 8, 1450 feet south of Wibaux, width 1850 feet, maximum depth 16.6 feet; section 15, 1376 feet south of main line——"

Q. That is the main railroad line?

A. Yes, sir.

Mr. McCARTHY: That is the embankment shown on the relief map?

A. That is the center of the track.



(Testimony of John Oien.)

A. "Width 2410 feet, maximum depth 18.6 feet; section 18, Massey's Ranch, width 600 feet, maximum depth 14.3 feet; section 11, First Avenue South, width 2650 feet, maximum depth 23.0 feet; section 12, 700 feet north of main line, width 1420 feet, maximum depth 15.5 feet; section 14, 3400 feet north of main line, width 1240 feet, maximum depth 17.3 feet."

Mr. McCARTHY: I would suggest Mr. Oien, while you think of it there, that you take your pencil and write in after "M. L." "Main Line", so we will know what it is. You might put the word "Feet" at the first one there, opposite the 16.7.

I haven't a cross section north of the main line here with me this morning; it is in Billings, I presume—I couldn't say for sure. I don't remember whether that has been introduced in evidence before. I have notes on that cross section. As to the width of the channel [236] on the first cross section north of the track that I took, I have not my notes here in the courthouse.

Mr. MAURY: It (the typewritten sheet) is marked "Plaintiff's exhibit P-8."

Mr. McCARTHY: Has that been offered? Exhibit P-8 is offered in evidence.

The COURT: It may be received in evidence—P-8.

I haven't that cross section here.

Those measurements of depth of water were taken from bed of the stream. The approximate difference

(Testimony of John Oien.)

in elevation of the high-water marks north of the railroad and the high-water marks south of the railroad track for June 7, 1929, was 5 feet. I can refresh my memory from a paper book which you are showing me, page 543, (Transcript on Appeal, No. 2438, Bailey, et al., and other cases, vs. Northern Pacific Ry. Co.). The width of the channel of the stream at the closest measurement that I made north of the bridge, at that particular point, was approximately 170 feet.

Cross Examination:

(By Mr. McCarthy).

My attention has been directed on direct examination, to the bridge just in the vicinity of the Brophy ranch. The bridge is about half a mile north and a little east from the Brophy house. Directly south of the bridge there is, in the way of a natural formation, a big hill, there is a bluff in there, and the Beaver Creek coming down from the south runs around the edge of that bluff; it makes a big sweep or curve there.

Q. Now, Mr. Oien, if the water of Beaver Creek got out of the banks on June 7, 1929, and was sweeping across country—got out of the banks south of the Brophy house and south of this bluff that you speak of, and sweeping across country, would the main current of the water curve around and follow the outline of the bluff and go under this bridge, or would the bluff act as a [237] shelter and break-water for the bridge?

(Testimony of John Oien.)

A. I would say it would act as a break-water and the main current would be thrown to the west.

Redirect Examination:

(By Mr. Maury).

Q. Whereabouts, or opposite what point on the profile showing the bridge, would that bluff be?

A. East end of the bridge is the bluff. I don't remember how far that bluff extends upstream. I should say that the stream hugs the bluff for a distance of two or three hundred feet, I wouldn't be positive about it. The stream strikes the bluff at an angle; it comes on the southwest and not so very far above the bridge—two or three hundred feet, as near as I can remember. Away out to the west, as to the depth of the water at any point to the west outside of the main channel or outside of the bridge, we will put it, will state that in here (indicating) is about 6 feet or a little better; that would be 200 feet west of the bridge, and from there, it gradually grew less until it was nothing to a thousand feet. That bridge is made of wood and was when I saw it in July, 1929.

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R. A. LYMAN,

recalled for further direct examination, by Mr. Maury:

Q. Mr. Lyman, how high would water have to be at the old bridge to be backed up and go over



(Testimony of R. A. Lyman.)

Second Avenue South in the region of the water tower?

A. You would mean the elevation of that country at the water tower as compared with the bridge?

Q. Yes.

A. About 13.9 feet. That is using Mr. Oien's starting point. As to how high the water would have to be at the bridge to cross over the track now between the elevators and near the county road crossing, will state that 13.3 feet is the top of rail above the point under the bridge; 13.3 feet higher than—top of rail—where the spur crosses First Avenue South. [238] In regard to difference in fall of creek from the railroad bridge to the county bridge, there is a fall of  $2\frac{1}{2}$  feet in a distance of 850 feet measured along the meanders of the stream; that would be a fall at the rate of approximately 15 feet per mile. From the county bridge around to the stream right south of the green house has a fall of 4.2 feet in a distance of 1750 feet, or approximately 13 feet per mile. From that point to opposite Massey's has a fall of 2.6 feet in 4,000 feet, or about  $3\frac{1}{2}$  feet to the mile. The effect of increase in fall on water in a running stream will increase the speed, other things being equal.

Q. What effect would an increase in the fall of the stream from Mattie Miller's towards the county bridge have in deflecting water in the direction of the stream and from the bank?

(Testimony of R. A. Lyman.)

A. I wouldn't hardly use the word "deflecting"; it would enable the water to flow more freely; you might perhaps use the word "evacuating" the water there.

The highest water mark that I was shown at Lentz's, 800 feet to the north of the fill, before the 1929 flood, was for the 1921 flood and it was 8.2 feet above the bottom of the channel under the bridge. The correspondence that I would draw as an engineer, between that water mark at Lentz's and water going over the elevator track or going around over Second Avenue and down the stream, explaining,—will state that the water never having been over that stage at Lentz's and considerable testimony at different times showing it having been through the swale and over the elevator tracks would indicate that several times at least, there had been a back-up of water at the bridge.

Q. Would that indicate to you as an engineer, that whenever there had been a back-up around through the swale or over the elevator tracks, if that testimony was correct, that there was obliged to have been a back-up?

A. Absolutely.

Q. By the fill, because of this difference in the height at [239] Lentz's?

A. Yes, sir.

Mr. McCARTHY: I would suggest that it is practically cross-examination of this witness. Of course, I understand he may have considerable lati-

(Testimony of R. A. Lyman.)

tude in putting questions to an expert witness. But I think a witness should be permitted to say something more than "Yes" or "No". Object as an improper form of question.

Mr. MAURY: I will modify it.

The COURT: Yes; it is leading of course.

Q. If it has been correctly testified to here by the witnesses who spoke of the water going over the railroad track by the elevators, and at times, going around by the water tower down the swale, and if the high-water marks that you have given at Lentz's are correct, then what cause would you assign for that difference?

Mr. McCARTHY: Objected to, if the court please, being a hypothetical question not based on all of their evidence.

The COURT: It is rather difficult for the court to say whether it is sufficiently informative or complete. A hypothetical question—you can develop that on cross-examination very readily.

Mr. McCARTHY: My point is this: It ignores the fact of testimony of Mr. Sherman that when he went across the street in the morning, water was flowing from the south to the north. My position is, it is a trick question, in that it takes in part of the testimony and not other parts.

Mr. MAURY: This is as to previous water marks. It doesn't come down to June 7, 1929.

(Question repeated), adding: "Previous to 1929"?



(Testimony of R. A. Lyman.)

Mr. McCARTHY: It is a trick question.

The COURT: Supply those times.

Mr. MAURY: I have added to the question: "Previous to 1929".

The COURT: All right; answer the question.

[240]

A. Well, conditions would indicate there must have been some damming up or stoppage of the water at the railroad bridge.

I have seen the wire screen exhibit before; I saw a very similar screen on Lentz's house. Explaining to the jury those marks, apparently, of rust (this is the top with the brass brad in it), I heard Mr. Lentz's testimony and I thought he explained it correctly; it would be my idea that he did; that water at some time during the flood stood at this bottom—if this was the bottom—for some little time. There is always accumulated silt or dirt that will accumulate at the top line of the flood. If he is correct that every time a chunk of the embankment would go out, it would rise suddenly to this point and the same thing would happen again. There are seven of those well-defined lines that I can see on the exhibit. I didn't use these as high-water marks and I don't remember whether this was a half-screen or a whole screen, but the top mark on the whole screen did coincide with the junction of the sashes in the window which he gave me as the high-water mark and checked perfectly with the different high-water marks inside his house.

(Testimony of R. A. Lyman.)

We are all familiar with the compression of air at every gas station. Water is incompressible, for all practical purposes. There could be no compression of water on the surface of the earth.

According to my computation, the water at the bridge at high-water on June 7, 1929, was going probably right at 27 feet per second; that is about 18 miles per hour.

Q. One and a half foot a second is a mile an hour?

Mr. McCARTHY: Approximately.

Mr. MAURY: Approximately, by any calculation.

According to my calculation, the water in the viaduct at the peak, on that day, was going about 18 feet per second. The speed would vary with the peak; as the peak rose or fell, the speed would vary, absolutely. [241]

I said yesterday that my estimate of the water passing Massey's was 16,000 or approximately 16,000 cubic feet a second. I studied carefully, or studied the amount of water around the town in the 1921 flood and its elevations.

Q. What bridge space, or what length of bridge in your opinion, after calculations, would have carried 16,000 cubic feet of water without permitting it to rise to any greater elevation near the Wagner property than the flood of 1921?

A. A bridge identical with the bridge existing in 1929, except for an added width identical with

(Testimony of R. A. Lyman.)

other conditions, 116 feet long would carry 16,000 cubic feet under the same stage of water as existed in 1921,—116 feet of clear opening. That is taking into account also that the viaduct opening remained the same through from 1921 to the flood of 1929.

The elevation of the ground on which Massey's horses stood as pointed out to me by Massey and as pointed out here in court by Massey, as compared to a point in the stream opposite to that point of the horses, was approximately 12 feet higher than the bottom of the creek at Massey's.

In nature, a tributary stream will always enter a main stream with the acute angle upstream. I think it might also be interpreted, that would be true,—that the tributary stream is always deflected downstream. The idea and statement which I have just made could in a way, be illustrated by a diagram which I see (a diagram cut from a page in a book and shown to the witness by counsel). That correctly shows my idea that I intended to convey—tributary streams are always deflected downstream as they enter the main stream. I don't know what that is intended to portray, but that does illustrate it.

Q. Draw an arrow pointing downstream.

Mr. MAURY: We offer in evidence this illustration and we will paste something over the legend on the back. [242]



(Testimony of R. A. Lyman.)

Mr. McCARTHY: I have no objection. If anybody can make anything out of that, they are welcome to it.

Mr. MAURY: It was said that this tributary went upstream to make that width there——

You can see, gentlemen of the jury, that the small angle on the junction of streams, is always upstream.

The legend will be covered up on the back.

(Diagram marked plaintiff's exhibit P-9).

The COURT: Very well.

If a lake is created by an obstruction, water rises by reason of a fill or makes a lake, and if there is a hole in the obstruction, there is a general movement of all of the water down the lake. I suppose it could be compared to a large crowd trying to get through a small gate to a baseball game.

You asked me yesterday the "purpose of riprapping": I don't think "abutment" was mentioned.

Q. Under what circumstances would an abutment or bank near a bridge be riprapped?

Mr. McCARTHY: Objected to as repetition.

Mr. MAURY: I am not certain whether I did or not.

The COURT: I think so; I think that was all testified to.

Cross Examination:

(By Mr. McCarthy).

I recognize defendant's exhibit D-10 as substantially a map of eastern Montana, with particular

(Testimony of R. A. Lyman.)

reference to the Wibaux-Beach-Carlyle-Ollie territory involved in this case; it is approximately correct; I don't claim it may be exact, but I think it at least illustrates the relationship of the country in question in relation to Billings and other points.

Mr. McCARTHY: Defendant's D-10 is offered in evidence.

Mr. MAURY: No objection.

The COURT: It may be received. [243]

I recognize defendant's exhibit Y-13 as a map showing the watershed of Beaver Creek south of the Northern Pacific Main Line at Wibaux, Montana, and approximately the location of various ranchers or farmers in the valley; I don't know about these residences here. From what I have heard described here, I would suppose that these people live at about these places.

Mr. McCARTHY: Defendant's Y-13 is offered in evidence.

Mr. MAURY: No objection.

Mr. Oien and I made a number of checks as to elevations at various points in the town of Wibaux and south of the town, and I was referring to a memorandum this morning when I was testifying, that I have checked. All the elevations or at least a great many of the elevations that are important in this case are set out on that sheet; those that I didn't check, I accepted, knowing Mr. Oien's work; I didn't physically check them, I accepted them.

Q. Didn't you and Mr. Oien go down and check them over?

(Testimony of R. A. Lyman.)

A. Quite a few of those I didn't physically check I accepted as correct.

Mr. MAURY: I suggest they be read now.

Mr. McCARTHY: With all due respect to the jurymen, I don't see how they can remember all these.

Q. Defendant's D-11 is shown the witness. Does that correctly set forth the elevations at the points described on the exhibit?

A. I wouldn't doubt it.

Mr. McCARTHY: We offer D-11.

Mr. MAURY: No objection.

The COURT: It may be received.

Q. Read it off. Those are set forth in sea-level datum Mr. Lyman?

A. Yes, sir.

Mr. MAURY: Can you translate them with reference to the point that you agreed on, under the bridge?

A. Yes.

Q. Let us read all of these first in sea-level datum and make the comparison there. [244]

A "STATEMENT OF VARIOUS ELEVATIONS  
AT WIBAUX—NORTHERN PACIFIC  
DATUM, Group No. 1:

Elevation of bed of stream under Beaver	
Creek bridge .....	2620.0
Elevation of Wibaux Street (Main St.) at	
Orgain Avenue .....	2635.4



(Testimony of R. A. Lyman.)

Elevation of Wibaux Street (Main St.) at Second Ave., South.....	2632.8
Elevation of nominal low water flow line Beaver Creek at intersection of Wibaux Street (Main Street).....	2626.7
Elevation of high water Mattie Miller's Hotel, June 7, 1929.....	2640.6
Elevation of high water Congregational Church about 300 feet north of track, June 7, 1929.....	2634.0
Elevation of sidewalk on street in front of Congregational Church .....	2630.1
Elevation top of elevator spur track at in- tersection of First Avenue South.....	2633.0
Elevation of ground line intersection of 'E' Street and Second Avenue South.....	2633.2
Elevation top of river bank in bend of Creek at intersection of 'E' Street.....	2633.9
Elevation of nominal low water in Beaver Creek at intersection of 'E' Street.....	2626.7''

WITNESS: You have made some subtractions here. Do you care for those?

Q. Yes, put it all in.

A. They have taken the difference between the last two elevations I read, the difference being 7.2.

"Elevation of Wibaux Street (Main Street) at 2d Ave., So.....	2632.8
Elevation of nominal low water in Beaver Creek at intersection of Wibaux Street (Main Street) .....	2626.7''

(Testimony of R. A. Lyman.)

The difference between those two being 6.1.

“Elevation of ground line at Massey’s  
house ..... 2646.7

Elevation of nominal low water Beaver  
Creek at Massey’s cow shed..... 2632.2

[245]

Difference in elevation of those 14.5.

Group No. 2: Elevation of high water at  
door step Mattie Miller house, June 17,  
1921 ..... 2634.0

Elevation of floor O’Keefe house, June 7,  
1929 ..... 2640.2

Elevation of high water O’Keefe house,  
June 7, 1929, about..... 2640.1

Elevation floor of the Youll house, Davis  
Addition ..... 2642.7

# STATEMENT OF VARIOUS ELEVATIONS SHOWING GROUND LINE AND HIGH WATER IN THE VICINITY OF MASSEY HOUSE ABOUT 3000 FEET SOUTH OF WIBAUX:

Elevation of floor at Massey house..... 2648.4

Elevation top of bank in bend about 300  
feet southeasterly from Massey house..... 2644.9

Elevation of low ground between Massey  
house and county road to the east..... 2644.5

Elevation of low ground about half way be-  
tween Massey house and county road to  
the east ..... 2644.1

(Testimony of R. A. Lyman.)

Elevation top of ground where horses stood about 500 feet northwesterly from Massey house .....	2641.5
Elevation top of door cap in cow shed about 200 feet southwesterly from Massey house .....	2645.8
Elevation of high water June 7, 1929, about 200 feet west of Massey house.....	2643.5
Elevation bottom of creek about 180 feet southeasterly from Massey house.....	2629.3''

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There has been received in evidence here what I would call a relief map of the town of Wibaux. Explaining particularly what a profile map is, it is a map showing an elevation along one line. Reference has been made here to contour maps, a contour is a line connecting points of equal elevation and a contour map is a map showing those lines. It is my understanding that the surveying department of the Northern Pacific Railway sent out around Wibaux there, made contour maps and then, from the contour maps this [246] relief map was made, I would suppose. I can find on the relief map here the outlines of the contours when I look for them. I haven't attempted to check this map over thoroughly.

Q. But you have looked it over to satisfy yourself that it is as correct a presentation of a relief map for what is attempted to be shown here as



(Testimony of R. A. Lyman.)

probably what is humanly possible to do, and on that scale?

A. It is a very fine map and as good as necessary if all you wanted it for is general purposes. The scale is one inch equals fifty feet—one inch on this map equals fifty feet. That is true in both horizontal and vertical directions; so, when you go one inch on the map, you go fifty feet. For that reason, I don't believe the map should be used when you get down to fine details. But there is no question in my mind but that there has been an honest attempt, I presume, to portray the situation on this model as far as it is humanly possible to do. I believe I did make several criticisms; I still think I am right, perhaps, they weren't intentional. The criticisms I made were of a couple feet I believe, and that is a small fraction of an inch. One criticism I made was it didn't portray the old dam below the bridge; it didn't look that way to me. This (indicating) across the relief map here is to portray a pipe going across that has been protected with straw, manure and dirt. There is a water pipe running across Beaver Creek at Wibaux—there is something there. I never paid much attention, closely, whether the people there have packed it in with straw and manure and covered it with dirt; to me, it didn't show as prominently on the ground as it does on that relief map; it doesn't show as prominently as there.

Q. That city dam is located where with reference to the county bridge?

(Testimony of R. A. Lyman.)

A. What do you mean?

Q. I mean the dirt and straw and manure all covering the pipe as shown here.

A. That would be three or four hundred feet south of the county bridge. [247]

When I worked for the Des Moines Street Railway Company, I didn't design or construct any railway bridges,—I don't think so; I wouldn't say that I didn't at that. This railroad over in Cuba that I worked on was, I believe, 150 kilometers long, which would be about 100 miles. As to whether I designed any railroad bridges while I was on that railroad, it depends a little on what you mean by "design". I never designed the steel work. I decided on the openings for bridges and that sort of thing. I have heard in these cases, that the bridge in question which was in place at Wibaux in 1929 was put in under the supervision of W. L. Darling.

Q. And from what you as an engineer, know of the reputation of W. L. Darling, you would say Mr. Lyman, that the Northern Pacific secured as good an engineer as it was possible to do at that time?

A. Probably Mr. Darling had a very high reputation as a railroad engineer, that is all I could say. I am familiar with his reputation.

Q. Now, Mr. Lyman, in figuring the area under the railroad bridge you figured the space contained in the rectangle that is formed by the ground, the top of the bridge and the two piers, did you not?

(Testimony of R. A. Lyman.)

A. Figuring it, in what computations? I spoke of figuring the area of the railroad bridge and I said it would be plus that area of the two triangles.

Q. And that you gave an area of what,—1320 square feet?

Mr. HALL: He didn't give the triangles.

Q. Do you accept 1320 as the area?

A. I don't remember to what height you were giving it.

Mr. HALL: 920 is what he gave for the county bridge.

Mr. COLTON: 810.

Q. Give us the area of the water openings under the railroad bridge formed by the rectangle, plus the space formed by the two triangle openings at each side?

A. To what height—to the [248] bottom of the girder?

Q. Yes; you have heard that figure given before by other engineers as 1320. Do you agree with the figures Mr. Lyman?

A. No; I can't see where they can possibly get that much. 1190 is the best I can get.

The way I figure cubic feet of water per second, is the area of the cross section of the water in square feet, times the velocity in feet per second.

Q. If you had 18 miles an hour in velocity going through the bridge at Wibaux, how many feet would that be per second?

A. Filling up the girder——

Q. Going in your opinion—filling up the girder—27 feet per second that you used?



(Testimony of R. A. Lyman.)

A. I didn't mention filling the girder. Taking the area of the bridge 1100-odd, as I figured, and multiplying that by 27, the result is 29,270.

Q. Now, that didn't include the water that went out through the viaduct?

A. That isn't the water that went through the bridge; that is the speed after it made the drop.

Q. Didn't you tell us the way you calculated you multiply the area by velocity in feet per second?

A. Yes.

Q. When you multiply that, you get 29,000——

A. I did, but that isn't the velocity.

In addition to the water that went through the bridge over Beaver Creek on the day of the flood, I am satisfied that a tremendous volume of water went from the south of town to the north of town under the so-called viaduct; that was additional water to what went through the bridge.

Q. You told us yesterday, did you not, Mr. Lyman, that you computed the cubic feet of water per second that flowed through Wibaux in 1929, the day of the flood, was 15,000-plus, and you made it 16,000 in round numbers?

A. I estimated that as the flow past Massey's, yes, sir. [249]

The velocity that I used at Massey's in making that computation, the average velocity was 4.19 I believe—yes, 4.19 feet per second. That would be approximately three miles per hour. Whether it would be 2.8 figured down closely, I never tried to

(Testimony of R. A. Lyman.)

figure it; around three. I was here when Mr. Massey was on the stand.

Q. Did you hear his testimony that that water was flowing there all day at a speed considerably greater than a man would ordinarily walk?

A. I think so. I don't know that I heard Massey say that. He said he thought objects were moving faster than that.

Q. When a man speaks about how fast a man ordinarily walks, how fast is that?

Mr. MAURY: We object. That is not for the counsel or the witness.

Q. When you heard Mr. Massey testify with reference to how fast a man would walk, what did that testimony indicate to you in, say miles per hour?

Mr. MAURY: That is objected to; it means nothing.

The COURT: What one witness would mean by how fast a man would walk, it might not be the same.

In arriving at my computations I am absolutely ignoring Mr. Massey's testimony.

The width of the high water at the cross section at Massey's was 600 feet, stream width. I said that the elevation of the ground on which the horses stood, above the creek bottom, was 12 feet. Assuming that Mr. Massey's testimony is correct, that the water came up on those horses about 2 feet, 1½ to 2 feet, then there was a depth of 13½ or 14 feet, something like that.

(Testimony of R. A. Lyman.)

Q. Now, Mr. Lyman, directing your attention to the bank on the south side of Wibaux between the city water tank and say, the green house; on the elevations which you have given us, or from your notes, what was the greatest height of that bank above the creek bottom bed, right there on the edge of the bank? [250]

A. I don't know anything about the greatest; I was looking for the lowest; I got as the lowest about 7.2.

Q. Wasn't 7.2 your maximum?

A. Well, it depends on where you go. If you go beyond the water tank, it would be. No,—7.2 was what I tried for the dip—the entrance to the swale.

Q. If you had water to a depth of 14 feet rushing across that country and nothing but seven feet to stop it, you would expect some of that water to go into the town, wouldn't you?

A. I would expect some of it to go down the swale, yes.

I have testified in several of these flood cases in the District Court of Fallon County. Figuring the discharge at Mr. Massey's place, when I got my cubic-feet-per-second of 15,800, the area I used was 3774 (square feet). In figuring the velocity I used the Chezy and Kutter formula. In applying the Chezy and Kutter formula to ascertain the velocity of the water at the Massey place, it is necessary for me to decide on what slope I will use as one of the factors in using the formula. I used a slope .006. I obtained that from difference in eleva-



(Testimony of R. A. Lyman.)

tion from two points given by Mr. Oien, being a point at or near Mattie Miller's and a point at Massey's. Giving you a little more accurately the points I used: I took the bottom of the creek at Massey's, as he calls it, 2629.3, and the elevation of the bottom of the creek at Mattie Miller's or thereabouts, as 2626.7.

Q. Mr. Lyman, in taking your two points to ascertain the slope, you used a point about where you were computing the velocity, that is of the water, and a point considerably downstream from there, did you not?

A. I understand that Oien's section was a little above mine; I was getting points above and below. The point in the vicinity of the Miller house was considerably downstream. I don't think that I should, instead of taking the point at the Miller house, have gone upstream to a point at Massey's and taken the point there. [251]

Q. If it should appear here that the proper way to compute the velocity and in ascertaining the slope, is to take the point in the vicinity or in the first cross section that you considered it and the point upstream, then your whole computation is wrong?

A. No.

Q. And so far as ascertaining the slope is concerned?

A. No, sir. I took a point below the cross section and a point above, as I understand it; I took

(Testimony of R. A. Lyman.)

the grade of the stream—grade of the bed. Another factor you have to use your judgment on is the coefficient of roughness; I used the coefficient .030. It was as small a coefficient as I felt could possibly be used.

Q. I direct your attention Mr. Lyman, to your testimony given at Baker, Fallon County, Montana, in the case starting the 5th of January, 1934, with particular reference to testimony given by you on the 10th of January, 1934, page 65, lines 26 to 32, inclusive. Will you read that please? (Recess).

Q. Mr. Lyman, having refreshed your recollection by reading over the testimony to which your attention has been directed, didn't you testify previously that you used coefficient .04 or .045?

A. No, I don't think I testified to that; I said I wasn't sure.

Q. Didn't you say (handing transcript to witness) in answer to a question: "I don't remember but I think .04 or .045. Question: Either .04 or .045? Answer: I think so."

A. I testified that, yes.

As you decrease the coefficient of roughness it would not decrease the volume of cubic feet of water per second—the effect of taking .03 as a coefficient of roughness would not be to decrease the amount of water; it would increase it.

Q. So, you are taking a lower factor at this time?

A. I never took .045; I never said I did. But my testimony is as you read it. In getting the point

(Testimony of R. A. Lyman.)

of the slope that I took in the vicinity of the Miller house, as to whether I went straight across the [252] country or followed the stream all the way around, will state that the elevations were absolute; to get the slope I used the meandering distance. By "meandering distance" I mean the distance around that the stream runs ordinarily—the depth of the channel of the stream.

Q. Mr. Lyman, calling your attention to page 36 of your testimony given in the trial of a case in the District Court of Fallon County, Montana, last January (January 10, 1934), particularly to lines 24 to 29 inclusive. I will ask you to read that.

A. I have read it.

Q. Did you not testify at the trial to which your attention has been directed: "Disregarding any back-water, it was going,"—(referring to Massey's place; "it", the water), "it was going between eight and nine feet per second. Question: About how many miles would that be, about? Answer: Five to six miles per hour." Did you testify that?

A. That is my testimony, but it refers to an entirely different thing. If you go back far enough, it refers to 30,000 cubic feet per second. That is my testimony as you read it—that portion of it. Taking my area 3774 and multiplying that by 9, gives us the answer, 33,965. Using those figures, that would be 33,000-odd cubic feet of water per second.

Q. I call your attention to the record (printed Transcript on Appeal) in the case of Bailey, Stair,



(Testimony of R. A. Lyman.)

et al., and other cases, vs. the Northern Pacific Railway Company (the September and October, 1933, cases), page 600, folios 10 to 15, and I will ask you to read that.

A. I read it.

Q. Is it not a fact that in the trial of the case of Bailey, et al. vs. Northern Pacific, you were asked this question: "How fast was that water going after it left Massey's, Mr. Lyman? Answer: Well, I think it was going fully twice that fast at Massey's. I believe you misunderstood my testimony. I don't [253] believe I ever testified it was only going four miles an hour at Massey's. \* \* \* I imagine it was going nearly twice that fast at Massey's."

Mr. MAURY: You read the word "fully" in the text you served on us.

Q. "I think it was going fully twice that fast at Massey's. I believe you misunderstood my testimony. I don't believe I ever testified it was only going four miles an hour at Massey's. \* \* \* I imagine it was going nearly twice that fast at Massey's." That is the way it reads **here**. By "nearly twice as fast as four an hour," that would be nearly eight miles an hour wouldn't it?

A. Yes.

Eight miles an hour is approximately 12 feet per second. Multiplying my area of 3774 by 12, it gives us the answer, 45,288.

Yesterday, in answering questions propounded to me by counsel for the plaintiff, I referred to

(Testimony of R. A. Lyman.)

certain formulas, Dickens', Myer's, Talbot's, and so forth; I recognize Webb as an authority on engineering; it is a good text-book.

My attention having been called to a volume Webb on Railroad Construction, with particular reference to pages 252 and 249. On page 252 is the Myer's formula, and Talbot's, set forth that I referred to yesterday; I didn't give the results yesterday, I mentioned that I had at other times figured them up from that.

Q. After Webb sets out Myer's formula and Talbot's formula, will you read into the record what Professor Webb himself said?

Mr. MAURY: First, read the formulas; read both formulas.

Q. Read the whole thing then.

The COURT: What are you going to gain by that?

Mr. MAURY: The bridge is insufficient, tested by either one of those formulas. Counsel has offered them; let him put them both in. When you actually take Myer's [254] formula and apply it to this bridge, you will find the bridge is insufficient——

The COURT: I don't want to hear argument on that now. My understanding of Mr. Lyman's testimony was that he told about these various formulas and he had figured them out and all, and that his judgment was that the opening was insufficient as to the formulas.

Mr. MAURY: Everyone except Myer's. We can show it is insufficient on Myer's formula.

(Testimony of R. A. Lyman.)

Mr. McCARTHY: What I am interested in is to have him read the qualifying remarks of Mr. Talbot himself.

Mr. MAURY: Let him put in the thing it qualifies.

The COURT: What does it qualify?

Mr. McCARTHY: Talbot's—

The COURT: Q. Did you refer to Talbot's formula yesterday?

A. I did. I didn't give any results yesterday. I said one showed the bridge as sufficient,—possibly one, and all the others showed it insufficient.

Q. Tell us what the Talbot formula was and then his words of caution.

Mr. MAURY: It was the Myer's formula he spoke of showing that the bridge was insufficient.

The COURT: Go ahead; let us "get somewhere."

A. (reading): "Area of waterway in square feet equals C times (4th root) (drainage area in acres); 'for steep and rocky ground C varies from  $\frac{2}{3}$ ds to 1. For rolling agricultural country subject to floods at times of melting snow, and with the length of the valley three or four times its width, C is about  $\frac{1}{3}$ ; and if the stream is longer in proportion to the area, decrease C. In districts not affected by accumulated snow, and where the length of the valley is several times the width,  $\frac{1}{5}$  or  $\frac{1}{6}$ , or even less, may be used. C should be increased for steep side- [255] slopes, especially if the upper part of the valley has much greater fall than the channel at the culvert' " \*



(Testimony of R. A. Lyman.)

WITNESS: It says "culvert", not "bridge."

" 'As an illustration, if the drainage area is 100 acres, the area of waterway should be C X 31.6. The area should then vary from 5 to 31 sq. feet, according to the character of the country. Like the previous estimate, the result depends upon the choice of a coefficient and disregards local variations in rainfall, except as they may be arbitrarily allowed for in choosing the coefficient.' " "Value of empirical formulae. The fact that these formulae, as well as many others of similar nature that have been suggested, depend so largely upon the choice of the coefficient shows that they are valuable 'more as a guide to the judgment than as a working rule', as Professor Talbot explicitly declares in commenting on his own formula. In short, they are chiefly valuable in indicating a probable maximum and minimum between which the true result probably lies."

Myer's formula and Talbot's formula as set forth in Webb, are contained in a chapter, the heading of which is on page 249; the heading of that chapter is "Culverts and Minor Bridges." My attention having been called to page 196 of Webb, we find that bridges, trestle bridges, and so forth, are set forth in an entirely separate chapter.

Q. So that Myer's formula and Talbot's formula is not given in the chapter on bridges?

A. Yes, sir.

Q. He gives it only on culverts and minor bridges?

A. They are only proper for those small two—

(Testimony of R. A. Lyman.)

Q. Mr. Lyman, have you been in touch with, or seen, the report of the Army engineers, who made a study of the Beaver Creek situation?

Mr. MAURY: We must object as not proper cross-examination, and what the Army engineers have said is only relevant when the Army engineer's deposition is taken; it is entirely a [256] matter of hearsay.

Mr. McCARTHY: We have the same right, in my opinion, to examine this witness on a United States Government report as we have to examine him on a text book,—to see whether or not he agrees.

Mr. MAURY: He must first be asked whether that is authentic—whether it is any authority to him, or whether he believes it to be an authority. It is pure hearsay.

Mr. McCARTHY: I will withdraw the question for a minute. Defendant's D-12 being a duly certified document of the United States Government, is offered in evidence.

Mr. MAURY: No certificate is here; we object to it.

Mr. McCARTHY: The certificate is there.

Mr. MAURY: No certificate from any person who is qualified to certify testimony to this Court. It is objected to as hearsay matter *inter alios*; matter not shown to be relevant or competent in any way in this Court; not shown to be made by any person that is before the Court for the purpose of examination. It is propaganda. It might well be

(Testimony of R. A. Lyman.)

propaganda, just as well, of the Northern Pacific Railway Company, and in fact, if one were familiar with the trials that have gone before, one would see a correspondence between certain testimony and what appears in this thing, so great that it would show that there were some of the Northern Pacific engineers that have testified previously in these cases, must have given some of the data to the persons who made this report; it couldn't be otherwise. Furthermore, the report goes outside entirely, of the realm of the case, into regions where there is no similarity of conditions at all. Instead of a slight dissimilarity of the movement of the creek of 100 feet to the east, this report goes to Marmarth, in one of the Dakotas,—it goes around by Medora I think; it goes—it [257] touches at Wibaux. It is purely a matter of hearsay and not properly identified in any way for reception in this Court—for instance, “Plans for Flood Protection at Marmarth, North Dakota” appears on it. Who made it? Nobody knows,—no name of any Army engineer. It would be an invasion of the Judiciary by the Executive—if this comes from the Executive branch of the Government, and it possibly does—it means nothing to anybody.

The COURT: Who made the report? Was it a board of the Army engineers?

Mr. McCARTHY: It came from the United States District Engineer's office,—Report to the Secretary of War,—duly certified; a study of flood-



(Testimony of R. A. Lyman.)

control conditions, with particular reference to the Town of Wibaux; we have only taken that part of Wibaux.

The COURT: Has any engineer that had anything to do with compiling this report——

Q. Mr. Lyman, you have had a copy of this——

A. I have had a copy of a report and a map.

Q. And you told one of the Northern Pacific engineers of its existence?

A. Mr. Beach?

Q. Yes.

A. I don't remember whether I told him or not; I remember a conversation where it was mentioned, yes.

Mr. McCARTHY: Of course, Mr. Beach thanked you at the time, and I thank you now.

The COURT: I will have to look this over and consider it. Go to something else; I am not going to take the time now to pass on it.

(See page 212 [page 333 of this printed record]).

I can give you the ground elevation at Wibaux or Main Street at Orgain Avenue; it is 2635.4, sea-level elevation. The elevation of the surface of the ground or the sidewalk in front of the Congregational Church—Community Church—the church that is [258] located on Wibaux Street, north of the railroad embankment, is 2630.1. The difference in those two elevations is 5.3 feet. The difference in the elevation of the creek at the point here at the turn and the point here opposite the church (indicating on map), it would be approximate.

(Testimony of R. A. Lyman.)

Q. Can you give it to us approximately?

A. Would the creek under the bridge suffice for both?

Q. No, I want to get the elevation of whatever point you have it on up here in the creek south of the railroad bridge and north of the railroad bridge?

A. I haven't any elevation between the railroad bridge and the county bridge. I have both of those.

Q. What I have in mind is the difference in fall between the elevations at points about half——

A. I can split the difference in the two elevations at the two bridges; I believe it would be a fair elevation for what you want. That would be (this is an approximate figure), I believe the creek in line with Orgain Avenue—would that be what you want? Elevation 2621.3. I haven't got the elevation of the creek at a point directly east of the Community Church. I think it would be fair to say that the difference in elevation would be approximately two feet—somewhere in there; just about I imagine. So that the fall of the creek would be about two feet and the difference in ground elevation from Orgain to the Community Church was 5.3.

Q. So, you would expect water to run down Wibaux Street faster than down the creek, wouldn't you?

A. No; but it didn't run down Wibaux Street—Would I expect it to go faster than down the creek? It would, where difference in elevation, yes. Water would go down where there was a difference of 5.3

(Testimony of R. A. Lyman.)

faster than it would where there was a difference in elevation of approximately 2 feet.

The elevation of the high-water marks at Wibaux and First Avenue South for 1929, was approximately 2640. If you want it more exactly, I can give it. The elevation of the high-water mark [259] at the Mattie Miller house was approximately the same, perhaps two or three inches higher. I can give them both exact, if you want it: the high-water mark at the Mattie Miller place was 2640.6 and the high-water at intersection of Wibaux and First Avenue South was 2640.2, as I have it. I have got the elevation in some of those houses, of the high water of June 1929, at the point near the city water tower, but they weren't very reliable.

Q. What did you get, the nearest elevation of high water in 1929 in the vicinity of the water tank, city water tank, either at the tank or right adjacent to it, or as close as you can come?

A. I have two houses where people gave me high-water, but they admitted they weren't sure of them; but, assuming they were—2641.4. I have no elevation of high water at E Street and First Avenue South.

The valley, generally speaking, to the south of Wibaux widens and narrows—very much so. The effect of taking water out of a wide area where it had overflowed, and forcing it through a narrower portion of the valley is to increase the velocity, other things being equal. In fact, generally speaking, when you increase the velocity or speed of the



(Testimony of R. A. Lyman.)

water, invariably, you can get more water through an opening than you can if the water is coming in slowly; if the water is coming fast, there will be more of it go. If you got it up to a velocity of 18 miles an hour at the railroad bridge in Beaver Creek, I would expect to get a lot more water through without spilling over the sides, at 18 per hour, than if it was only going 4.

Redirect Examination:

(By Mr. Maury).

The carrying power of moving water of objects of a greater specific gravity than water, increases as the sixth power of the velocity, and if water going one mile an hour will move a certain object, water going at ten miles an hour, the same [260] water, it will move an object 1,000,000 times as big.

Q. Mr. Lyman, examine the book—Webb's—and see if the Myer's formula you spoke of yesterday is not the same one I used at the Virginia University forty years ago, and if that is the opening at the bridge for the water, where the water shall be the square root of the acreage of the watershed multiplied by a coefficient varying with the character of the watershed, from one to four?

Mr. McCARTHY: Objected to, because he is obviously asking the witness to do the impossible, namely to take the formula put in a chapter relating

(Testimony of R. A. Lyman.)

to culverts, and have him say that chapter refers to bridges.

Q. It is on page 252, I think, or 256,—right in there somewhere.

The COURT: Well, what would you denominate the bridge in this case, for instance? Would that come under the chapter of bridges or small bridges?

Q. Oh, no, there is no question about that, Mr. Lyman. The bridge over Beaver Creek, you can't class as a culvert or minor bridge, can you?

A. Not now.

The COURT: How was it in 1929?

A. I think you would call it a small bridge. There is no definite line between them. I don't know where you draw your line.

The COURT: Counsel was making a point in that distinction between the chapter on bridges and the chapter on culverts or small bridges. I don't see what you can make out of that question propounded by counsel.

WITNESS: What was the question Mr. Maury?

Q. Myer's formula that you spoke of yesterday, is it not the square root of the acreage in square feet, multiplied by a coefficient varying from one to four, according to the character of the climatic conditions of the watershed,—never less than one and not more than four?

A. That is it. That is Myer's formula. I have calculated before the square root of the acreage here; I don't [261] remember it now.

Mr. McCARTHY: What coefficient?

(Testimony of R. A. Lyman.)

Mr. MAURY: We will have him use the coefficient first and then let him tell us what the coefficient on the watershed should be, the lowest coefficient being one,—the minimum.

A. If I have made my computation correctly, according to Myer's formula, the area would vary from 1467 to 1868 square feet. In a bridge 65 feet long and for banks 6 feet high, there would exist 390 square feet. That would not in anywise measure up to the lowest, the minimum—the square footage,—the minimum required by Myer's formula.

There are elements in this watershed that would lead me to use a higher coefficient than the minimum; I wouldn't consider this formula at all. In the first place, I don't think it a proper formula for a watershed.

Q. But that was the one you were speaking of that the bridge might comply with?

A. This is the smallest formula by far; it doesn't comply—not to carry water put at over 6 feet in height.

Q. And without backing it up over the ground here (indicating)?

A. It wouldn't get into the main portion of the town at all. But it would, I imagine, back it up a little behind the bridge.

Q. Mr. Lyman, attention was called to certain of your testimony, about you having said, or claimed that you said, that there was 30,000 cubic feet of water passing Massey's. Was that given in answer to a hypothesis of counsel that was submitted to you?



(Testimony of R. A. Lyman.)

Mr. McCARTHY: I submit the record itself shows.

Q. Read the record given at the same time and at the same examination, and from page 405 (Transcript on Appeal, case of J. R. Bailey, et al., and other cases, vs. Northern Pacific Ry. Co.).

A. Do you want me to read it aloud?

Q. Yes. Read it aloud, and commence at line 5. Was that testimony [262] given by you at the same time and same examination where they say that you said there was 30,000 cubic feet going—— Read it.

A. "Taking my figures and assuming they are correct, and assuming there were 10,000 cubic feet of water per second passing by Mr. Massey's place in 1921, and 30,000 cubic feet of water per second passing by Mr. Massey's in 1929, I can not compute for you what the increased carrying power of the water would be in 1929 as compared to 1921; the velocity would not increase with the cubic feet per second. You can only estimate the carrying power from the velocity; three times the carrying power doesn't mean three times the velocity. Velocity increases with volume, but not in proportion. If we had three times the volume of water coming down through that valley and passing through these narrow places in and out, I would expect, because it would raise higher, that the water at the rate of 30,000 cubic feet per second would flow faster than the volume of water at 10,000 cubic feet per second; it is the depth of water that gives it the

(Testimony of R. A. Lyman.)

velocity." Is that all? I made that statement also in answer to counsel and I think, in the same examination.

As to whether I was asked to give my opinion as to the coefficient I was using in Kutter's or Chezy's formula without referring to my notes, will state that I was asked what coefficient I used and I said I didn't remember.

Q. You stated that to counsel and he pressed you for your best memory?

A. I repeated it, and the testimony shows that.

Q. In one of your answers, you said: "Disregarding back-water at Massey's, it was going between eight and nine feet per second. Question: About how many miles would that be? Answer: Five or six miles per hour." (Transcript, page 36, Jan. 10, 1934). Could you disregard, in your opinion, back-water at Massey's? I mean in actual computation?

A. No, I don't think you should; I think there was undoubtedly a back-water influence there. [263]

Q. And how far has back-water been measured to extend in lakes in Germany and Switzerland?

Mr. McCARTHY: Objected to, if the Court please. We were in India yesterday; let us not take in Europe today,—too remote.

Q. How far is it known by engineers to extend?

A. That depends on the fall of the stream. I think if you refer to one thing quoted in other testimony——

Mr. McCARTHY: The further objection that

(Testimony of R. A. Lyman.)

he is attempting to compare lakes and rivers of India,—a different type.

Mr. MAURY: Water is the same.

The COURT: I can't see what value it would be. There would be no similar conditions that he could refer to.

Q. This universal law as to lakes with water running out of them.

A. If you wish me, I will give you my understanding what is meant by back-water.

The COURT: Explain it briefly; it might throw some light on the subject.

A. In a flowing stream, whenever an obstruction of any nature or damming of the stream causes an increased depth of water immediately above the obstruction, there is an increased depth upstream from the obstruction to a great length, depending on various factors and, in theory, it extends forever—it goes to infinity, but practically of course, it doesn't. But it is a very complicated mathematical formula and one you couldn't apply to Beaver Creek; it would be if fairly straight,—you could get at it. But I am satisfied there is an increased influence at Massey's due to back-water; how much I couldn't say. I can't say whether there was a substantial amount—I don't know.

Q. When you were speaking of any speed of water at Massey's of eight miles per hour, did you have in mind what counsel asked you to assume—that there was 30,000 cubic feet per second?

A. I think that was the basis—that certainly



(Testimony of R. A. Lyman.)

was my impression— [264] that it was referring to a proposed flow of 30,000 cubic feet per second. I never assumed that there was any such flow there; I never believed that there was.

(Recess until 1:30 P. M.)

The COURT: In respect to defendant's proposed exhibit D-12 (No. 566), I will sustain the objection to its introduction. Proceed.

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R. A. LYMAN,

recalled for further redirect examination:

(By Mr. Maury).

I was asked by counsel this morning to multiply the speed of 27 feet per second,—18 miles per hour—by the cross-section area at the bridge. That was absolutely not a fair method of computing the water that was running away there, because at the rate of speed, that 27 feet per second, which is an enormous flow, is only there because of an impounding of water owing to depth of 10 to 13 feet and it applies that speed is only the portion after the drop. As to what makes the speed, it is the impounding of the water, where water is standing at two levels, it imparts a great speed to that portion of the water below; and by the drop itself, the speed is imparted—by the head from which it drops—gravity pulling it down is what gives it the speed. In order to determine the cubic feet per second passing through the bridge, multiply 27 feet per second by

(Testimony of R. A. Lyman.)

the area after it made the drop, not by the total area. There is not any sudden drop in the ground surface from Orgain Avenue to the point near the Community House; it is a fairly gradual drop.

Q. Is there any such drop there as could account for the difference of six or seven feet in the elevations, one side from the other?

A. It would be possible if it wasn't for the fact that I had high-water marks both north of Orgain Avenue and south of the Community Church showing that the level of this impounded water south of the track carried on at least to the old Sutherland garage and probably right to the embankment, and that the [265] drop had already occurred by the time it had reached a point opposite the section house.

Q. What effect as to the water further up the watershed would be narrowing of the banks at Massey's and at Burke's have? Where water from a wide open space comes to a narrow point of a stream, what effect does the narrowing of the banks have upon the water of the stream?

A. It would tend to impound it, other things being equal.

Mr. Oien introduced, or you introduced from Mr. Oien this morning, certain cross-sections, and he was asked for depth of water. I can take this cross-section P-7 and using it, tell how much the water raised by the flood of June 7, 1929. He shows not only the ground-line, but the depth of the low-

(Testimony of R. A. Lyman.)

water or water-level,—what I would call the living water in the bed of the stream; it is simply a matter of subtracting the low-water from the high-water. He has designated on his cross-section here, low water by dotted lines and the bottom of the stream below those dotted lines. That appears on all these cross-sections that you introduced this morning. I can tell from his cross-section what the rise of water was on June 7th at Burke's place, using the Burke cross-section; as a matter of fact, I have it figured. The rise of water June 7th at Burke's place was 16.4 feet, and that is taken from his cross-section that he introduced. As to what the rise of water was at Massey's place on June 7, 1929, he has no cross-section from that but his figures that we have checked on. I think those figures are a matter of evidence; they are on the list of elevations on which Mr. Oien and I agreed. That is here now—D-11; from that, I was able to determine the rise at Massey's as 11.3 feet on June 7, 1929. In consideration by anyone, of D-11 and the figures for elevations set in this column here, 2620 feet should be subtracted from each of these to determine how high the given point is above the [266] point B under the Northern Pacific bridge—2620 should be subtracted, and that is the top figure in the column, so that the next point, 2635.4, is really 15.4 above the bottom of the river under the bridge.

Recross Examination by Mr. McCarthy:

Q. Mr. Lyman, on redirect examination this morning, your attention was called to your testi-



(Testimony of R. A. Lyman.)

mony I had read you on cross-examination, as to the coefficient used by you in connection with Kutter's formula and you said that was your opinion at that time and you were not trying to give it exactly when I asked you about it at the other trial?

A. That is my recollection.

Q. I asked you during cross-examination, did I not——

A. I don't remember.

Q. Now, stop and think Mr. Lyman. Didn't the reference to the Kutter formula come on your cross-examination while the plaintiffs case was being put in?

A. I presume so; I don't recollect. I remained in the courtroom all the time the defendant's case was being put in or a good share of it. I was there when the defendant was putting some of its case in. I never went back on the stand to make any corrections in those figures. I figured the area under the railroad bridge as 1100 and some-odd feet—1190 I think would be the total up to the girders. I never had the opening of the areaway for water under the county bridge, except from your cross-section of First Avenue South, was the only place I ever saw that; I haven't that with me.

Q. That was 920?

A. I think so.

Mr. MAURY: We object. Disputes that arise hereafter are too imposing.

A. It was here and I was using it, if I remember right.

(Testimony of R. A. Lyman.)

Mr. HALL: He testified yesterday——

Mr. MAURY: Refer back to the reporter's notes, because a man's memory from yesterday to today is not so good [267 as calculations and the results of it.

Assuming 920 square feet to be the correct area of the open waterway under the county bridge, and taking my figure of 1190 square feet as the area under the railroad bridge, the railroad company under my figures, had provided an opening that had 270 square feet more than the county had under their bridge.

I referred here this morning to the cubic feet of water per second that passed a given point in 1921. I figured the cubic feet of water per second that passed through Wibaux per second, under the railroad bridge, in 1921; that figure was right at 10,000. So that if 30,000 or more, cubic feet of water per second passed through Wibaux in 1929, the flood of 1929, based on the rate of flow per second, was three times as great as that of 1921.

In the Beaver Valley there, following the creek up the valley, the slope, say in a mile on the average,—the average of the valley floor was about 12 feet per mile; each mile there was a difference in elevation of about 12 feet—each mile measured, disregarding the bends of the creek,—each mile straight line. Figuring the difference in slope for my computations this morning and taking the point I used in the vicinity of the Massey ranch and the point in the

(Testimony of R. A. Lyman.)

stream I used in the vicinity of the Miller house, I used a slope of .006 I think. .006 would be a slope of about 3.2 feet per mile I believe. As to why I used a slope of 3.2 per mile to ascertain as my basis of computation, when I said that generally speaking, the drop in that creek was about 12 feet per mile, will state that I was very explicit in saying that the drop of the valley was 12 feet per mile, measured straight, and I think yesterday, I said that that would probably mean about 6 or thereabouts feet per mile, measured in the creek. If it meant 6 measured in the creek, 6 is approximately twice the value of 3.

Mr. McCARTHY: Well, I think it is self-evident; that's all. [268]

Redirect Examination by Mr. Maury:

The County had left an enormous escapement for water outside of its bridge—for water coming down Beaver Creek; if the measurements I give are correct, they had left an escapement for water outside of the bridge. The correctness of the outline of the road here as portrayed on the relief map, I couldn't really criticize; I don't think it shows as much of a dip as there is, but it is hard to measure it. As to how much the dip is there below the level of the county bridge, I have the figures on that; the bottom of the sag in the county road east of the bridge is 9.7 feet lower than the clearance of the present county bridge. Now, there is some difference between the present county bridge and the one existing there in the flood, I don't know what is the



(Testimony of R. A. Lyman.)

difference. That sag is shown on exhibit Y-4; this (pointing) would represent the county bridge, from there to there.

Q. Indicating an arrow pointing down?

A. Indicated by a dotted line \* indicated here in black ink between points A and B indicates width of the county bridge. The sag starts out by a point indicated in black ink, C, and extends 775 feet probably, to a point indicated by black ink, D. This doesn't give the height of the bridge; I can't quite tell you what its deepest place would be. That is drawn to scale; the scale is one inch equals 50 feet horizontal,—the same both vertical and—These figures indicate about four to five feet, that portion of it,—the sag. The square footage there has been calculated 3230 (2230?). That would be an escapement for the water at the county opening there in addition to the bridge there.

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### OLIVIA WAGNER,

recalled for direct examination, by Mr. Maury:

At my father's store in Wibaux, the first week in June, 1929, I should judge that the height of the sidewalk above the [269] street was from 10 inches to 1 foot. The floor of the store above the sidewalk was about 1 foot. The height of the lowest clothing or shoes or any personal property—his chattels there—was a foot or a little more from the floor.

## NICK WAGNER,

recalled for further cross-examination by Mr. Hall:

Having been handed the complaint in the case of Nick Wagner vs. the Northern Pacific Railway Company, which was filed in Wibaux County, and calling my attention to the affidavit at the back end of it, that is not my signature there. I said, I don't think so. Maybe I testified the other day I signed the complaint and swore to the complaint; I don't think I ever seen that paper.

Q. Look at that right there. This is sworn to before Thomas C. Colton. It says: "Nick Wagner, being duly sworn, says that he is the plaintiff in the foregoing complaint," and it says: "Subscribed and sworn to before me,—Thomas C. Colton." Can you see? Look at that carefully and say in whose handwriting—or whose handwriting is that?

A. It is a good imitation; it is a pretty good imitation, all right.

Mr. HALL: We will call Mr. Colton.

Mr. COLTON: This is Nick Wagner's signature. It was signed before me as Notary Public and sworn to before me.

Q. (speaking to witness) That is your signature right there? (Witness nodding, indicating "Yes".)

Mr. HALL: We have the Dun and Bradstreet man here with another statement signed by him. He is not here right now. So, we can go ahead with our case.

Mr. MAURY: Sure. Just one question:

Q. Nick, you came to Mr. Colton's office and told him to sue the railroad? (No ans.)

(Testimony of Nick Wagner.)

Q. Nick, you came around and gave me a list [270] of your stuff and told me to sue the railroad, didn't you?

A. I did, somebody, yes.

Mr. HALL: We offer this in evidence, the complaint here, so we have it here for comparison.

Mr. MAURY: I think it is deemed in evidence, may it please the Court.

The COURT: It can be introduced with the understanding that a copy will be substituted after the trial. The original is in the Court now.

Mr. McCARTHY: The certified copy is here now.

Mr. MAURY: We agree to that. (Complaint unmarked).

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PLAINTIFF RESTS.

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L. B. BRYSON,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

I live at Ollie, Montana. Ollie is near the headwaters of Beaver Creek. With reference to the Beaver Creek watershed, the town of Ollie is nearly half a mile at the nearest point, from the creek. As to where water from Ollie drains so far as



(Testimony of L. B. Bryson.)

Beaver Creek is concerned, it drains in a north-westerly course towards Wibaux; water adjacent to Ollie nearly all drains into Beaver Creek.

The night of June 6, 1929, and the morning of June 7th, I was at home half a mile south of Ollie, about half a mile, right on the creek bank.

Q. Did you have a storm there that night Mr. Bryson?

Mr. MAURY: We object as too remote—35 miles away—No similarity of conditions has been or can be shown, and there being far better evidence much closer to the scene [271] and in the power of the defendant.

The COURT: Let the jury retire for a few minutes and we will talk about this. (Jury retired) (Argued).

Mr. MAURY: Now, as to all testimony that will be offered showing conditions above Brophy's place, that will be described, we ask to state to the Court now a general exception to all that.

The COURT: You can make your general objection to all that line of testimony above Brophy's place.

Mr. MAURY: That it is too remote and no similarity of conditions of property in town or near the bridge can be shown; or that none will be offered or will be established, and that the Court should exclude everything above Brophy's place and all conditions above that.

The COURT: Objection overruled.

Mr. MAURY: We except.

(Testimony of L. B. Bryson.)

(Witness continuing):

I live about half a mile south of the town of Ollie. Since 1909 I have lived in the vicinity of Ollie, but I have lived on this place that I am living on now since November, 1925. On June 6, 1929, there was a storm at Ollie where I lived; it was the hardest storm—hail and rainstorm—that I ever saw. I am not certain as to the time it started, but I think it was probably a few minutes past 9:00 o'clock when the first storm struck there at my place. I don't believe it lasted more than 45 minutes, that is the heft of the storm. It hailed for a few minutes, then rained hard for a while there, I don't believe more than 45 minutes. There was further rain there that night, there was rain during the night, along through the night, but I can't tell you what time or how much. There is a dam on the land that I live on. This was a dam that was built across Beaver Creek several years before and there had been a flood there before 1929 that [272] washed over the top of the dam and washed away portions of the dam and cut a ditch or small channel around the west end of it. The storm of 1929 completely washed out what was left of the dam in the main channel of the creek; it took the balance of the artificial dam out; gouged away a portion of the old original north bench of the dam—of the creek—gouged out a hole I should judge from four to five foot deep in the old creek bed.

Cross Examination:

(By Mr. Maury).

I don't know for sure when the storm was that cut the first hole through that dam; I didn't live

(Testimony of L. B. Bryson.)

there at the time it occurred. I could see that there had been a big hole cut through that dam by a previous storm, and that happened before I went there. I went there in November, 1925. I do not know from my own knowledge, how many inches of water fell up there that night—June 6th and 7th. Right in front of my house the water was clear out of the banks of the creek. As to the width of the banks: right in front of my house it is a considerable distance because there is a bank on the north side of the creek, but there isn't on the south side, because the land slopes. The creek at the peak of the flood in front of my house might have been at least 20 rods wide. There are  $16\frac{1}{2}$  feet to the rod; the creek was all of 320 feet wide. I don't know how deep it was at its peak; at its peak, it was deep enough to go over the road grade, which must be about, I would judge in the neighborhood of six foot high. There was enough of it went over the roadway so that after the storm subsided and the water fell, there was more than two feet of hail and other stuff piled on top of the road there. I have seen storms often where they come down to coulees and down to a fence, and I have seen five feet of hail piled up in a fence—corner or coulee. I haven't seen that very often, where it is five feet. That occurred where I lived in 1921, storm of that kind. [273]

Redirect Examination:

(By Mr. McCarthy).

The storm I saw of that character was at a place I was living in 1921. I moved into the vicinity



(Testimony of Earl W. Stark.)

of Ollie in November, 1925, and have been in the general locality out there since 1909.

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EARL W. STARK,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My full name is Earl Stark. I live at Carlyle, Montana, on the East Fork of Beaver Creek. I live near a place that has been identified on an exhibit in here, a map, near William Abrams; I live right with William Abrams now. In 1929, particularly on June 6th and 7th, I was living in a house right west of Mr. Abrams' place—of where he lives now. On defendant's exhibit Y-13, the circle around 10 in red ink, with the name "Abrams" opposite it, approximately locates my place of residence in June. I was at home on the night of June 6, 1929. Something unusual happened that night. In the evening of June 6th it rained real hard and then later on, that is along about between 7:00 and 8:00 I imagine it was, we went to bed and between 10:00 and 11:00, my father-in-law, Mr. Abrams, woke us up. At that time the creeks were running full. My father-in-law lived about half a quarter of a mile to the east of us. That was between 10:00 and 11:00 on the night of June 6th when he woke up and we got up. After we got up we decided the house he lived in was a stronger house than what

(Testimony of Earl W. Stark.)

we lived in, if there was a flood coming, so we got our family together and moved over with them. The elevation of my father-in-law's place compared with the ground elevation where I live, his house is sitting on kind of a knoll somewhat higher than what ours is, and on a stronger foundation. When I got [274] over to my father-in-law's place, I went down to the creek a couple of times to see if it was raising any and along after midnight I went to bed and about—it was somewhere between 2:00 and 3:00, that the water rolled in at the place; we could hear it running in the basement. That woke us all up and we looked out to see what was going on and we could see the water all around the house. From the house to the nearest point of the creek it was probably 250 yards. The ground line at my father-in-law's house as compared with the bank of the creek at the nearest place, is higher than the banks of the creek; I couldn't give you any idea just how much difference there would be,—there is quite a difference. The flood did damage or carried away buildings or property; it moved all the buildings where I was living and washed them away; it moved the house about a quarter of a mile and there was some of the buildings that we never did find, that is panels of them. There had been farm machinery left out in the yard; there was the farm machinery and wagons that was washed down the creek and also a Case engine that was washed to the creek. I had lived out in Beaver Valley along that creek since December, 1921. The storm of June 6th and 7th comparing it in extent, violence

(Testimony of Earl W. Stark.)

and intensity with any storm I had ever witnessed was worse than any I had ever seen around there. To the best of my judgment, the width of the high water—of the main flood water—in the vicinity of where I live was around 140 rods I imagine.

I recognize defendant's exhibit D-13. I am the one sitting down in the picture; that is where it left my house after the flood. That is the house I referred to that was washed away in the flood.

Mr. McCARTHY: Defendant's D-13 is offered. It shows the house that was carried a quarter of a mile.

Mr. COLTON: I don't know what the purpose is. (Argued).

The COURT: Well, I will permit its introduction. You [275] may object and save an exception.

Mr. MAURY: We except.

### Cross Examination

(By Mr. Colton).

I live 7½ miles from Ollie. I heard Mr. Bryson just testify on the witness stand that the flood at Ollie had been there at 9:00 o'clock. That flood that hit Ollie didn't reach us. That flood that hit Ollie hit the creek south of us; the flood that hit us came from the Carlyle country. I live around 31 miles from Wibaux. I don't know how far I live by the meanders of the stream; I couldn't say about that; I wouldn't want to say whether it was at least twice that. Mr. Bryson, the gentleman who just testified



(Testimony of Earl W. Stark.)

before, would be around  $38\frac{1}{2}$  or 39 miles from Wibaux.

I was living in that vicinity of the country during the year 1925. We had some high waters at that time, but we didn't call it a flood. That flood did not wash out all the bridges on the East Fork of the Beaver Creek; it washed some of the bridges out, I don't know how many there was. There was some that was washed out entirely and there was some that it didn't take clear out. I don't know anything about the dam that counsel for the defendant examined Mr. Bryson on—when it was washed out. Some of those bridges that were washed out clean during the flood of 1925 were east of us; the one west of us I don't believe went clear out.

I testified on direct examination that there was a difference in elevation of the ground where my house stood and that of Mr. Abrams' house. I don't know how high my house would be above the creek level; I wouldn't know just how high it would be above the creek level. I said I moved from that house because I was afraid of a flood coming and I moved to Abrams' because it stood on higher ground. You can see—

Q. Well, we are not down there; we want you to tell us.

A. You want the difference between the two places? [276]

Q. I want you to estimate how high the house that was washed away in this flood—your house—was above the bottom of the creek?

(Testimony of Earl W. Stark.)

A. Well, I don't know just how high that would be. It was not right on the bank of the creek; it was back 300 feet probably from the creek. It was not in a low place. It was up a little higher than the bed of the creek of course.

Q. How much higher? We want to give the jury some idea.

The COURT: He says he can't tell.

Mr. HALL: How high was the bank, from the creek up to the top of the bank?

Mr. COLTON: I am examining the witness.

Q. Was it three feet?

Mr. McCARTHY: What was three feet?

Mr. MAURY: We object to the interruption.

Mr. McCARTHY: We object to the form of the question, not being an intelligent question.

(Question repeated).

The COURT: Can you answer it or not? If you can make an estimate of height, say something. We want to get through with this.

Mr. McCARTHY: Maybe he can point out on the wall how much higher it was.

Giving you some idea,—you want from the bed of the creek up to where the level of the house was? It would be probably 12 or 14 feet from the bed of the creek.

During that flood there was no water on the floor of this Abrams house that I went to. Abrams' house is right on the flood plane of where the East Fork goes through, and there wasn't any water on the first floor of Abrams' house.

(Testimony of Earl W. Stark.)

Redirect Examination

(By Mr. McCarthy).

Mr. Abrams' house was probably two or three feet higher [277] than my house and the water was all around the Abrams house. None of it got in on the floor. That water was up to the Abrams house; the first floor was about four feet from the ground; it is on a foundation,—raised up. The water got all around the house but the foundation was high enough to keep it off of the floor. My business is farming.

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AUGUST W. MOLINE,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination

(By Mr. McCarthy).

My full name is August W. Moline. I live about 10 miles west of Carlyle and one mile south; it is about three miles west of the Beaver, on Ash Coulee. Ash Coulee empties into Beaver. I am a farmer. I have lived at my present place of residence since 1909.

I was at home on the night of June 6th and 7th. There was a storm out my way. Describing the best I can that storm: it was raining some in the evening of the 6th. During the night we had an awful hard rain and I got up about daylight, somewhere about



(Testimony of August W. Moline.)

4:00 o'clock and we seen more water than we ever had seen before. The water right in between my house—well, it wasn't right up to the house, but it come inside the fence and down; the width was something like 30 rods or 35 rods; about 35 rods was my best judgment as to the width of the high water at my place. We could see where Mr. Stark lived and his father-in-law, Abrams, from my place—we could see the porch, and we went upstairs and we could see it better. Describing what water was there and how it was: when we went upstairs we could see it plain and it looked like a good-sized lake over there. The water was not standing still; the water that went by our place went pretty fast. Where the creek was straight that water went straight; other places, it [278] come right straight across. By "straight across" I mean it left the main channel of the coulee; it cut across bends.

Q. Can you give us any idea of the speed of the water and velocity as it passed your place?

Mr. MAURY: We object to that. There is no evidence here that that was in Beaver Creek; it was a tributary of Beaver Creek.

The COURT: It was going down Ash Coulee and it was emptying into Beaver Creek wasn't it? Overruled.

Q. Can you give us any idea of the speed of the water as it passed your place?

A. Around 7:00 o'clock the water was down pretty much. That bridge over there, you could see

(Testimony of August W. Moline.)

half the railing on the bridge by 7:00 o'clock. You couldn't see anything of the bridge at 4:00 o'clock; it was all over the bridge.

Q. Could you give us any idea at 4:00 o'clock, when you got up and looked out, could you give us any idea of the speed or velocity of the water at 4:00 o'clock?

A. I don't know whether I could or not. It roared along pretty fast; you could hear it quite a ways.

Mr. MAURY: We move to strike out the answer as not responsive and indicative of nothing.

The COURT: Yes.

I have no way of giving you the miles per hour of the speed of that water. I don't think I could walk as fast as it went, I know that. I can walk four miles an hour; I know that I used to do that. Of course, I can't know what the volume of the water was that had been passing my place before daylight; it had been high quite a while and at some places it looked like it had been a little higher. Compared with any other storm we had from the time I lived there from 1909 on, we hadn't had anything to compare with that. [279]

Cross Examination:

(By Mr. Maury).

I believe that we did have a storm there in 1925. I think it carried out some bridges, I don't remember how many. As to where any of them were,

(Testimony of August W. Moline.)

I guess there was a grade west of my place. I am thirty miles probably on the meanders, from Wibaux; that is not straight across, that is the road; I could not tell how many miles as the stream meanders. I don't think it would be twice as far if you went around all the meanders of the stream; I couldn't tell whether it would be one and a half times as far.

I guess that water of the storm of 1925 got to Wibaux,—it runs that way. Some of the water seeps in the ground during those storms. The water I saw never could get through a little space on the model here (counsel indicating a point on model).

Q. Take a look at this.

A. No, it couldn't. It depends on how wide that is, from this point (you are indicating on the model) to this house over here. If this is only 600 feet wide and 11 feet deep at the deepest, as you say, that water I don't think, could get through there. I don't know whether it would ever get through a space 420 feet wide and 16 feet at the deepest. As to whether it could get through a space 420 feet, I never measured it from the creek. That would depend a good deal on the depth of the creek too whether it could get through that kind of a space. If it was not more than 16 feet at the deepest, I don't know whether it could get through that; what water we had went through there, we know that. It did go through; it didn't stand still. Some of it went in the ground. In that distance, an entire seepage of two or three feet of water will go



(Testimony of August W. Moline.)

right down in the ground; that depends on the season.

I wasn't there, to know whether the storm of 1907 entered the ground before it got to Wibaux; I went there in 1909. [280]

We had a storm there in 1921; I don't remember how big a storm. In 1921, some bridges goes out, it seems like; we had a heavy storm.

Q. Did any bridges go out in 1929, on June 7th?

A. Yes.

Q. Which one?

A. There was one a mile down the road went out; it washed away on one side of it; the bridge was there. That is not the bridge that sunk the next day; this is a bridge up nearer my place; this is only a six-foot bridge—six foot wide and 16 feet long. That bridge near my place didn't go out; it washed the dirt away from one side of it and that bridge sunk a little bit—one corner of it did; it wasn't gone. There was another big county bridge and one end sunk; that was on the main Beaver. I don't think it was moved five feet out of its place on one end; it just sunk down, I don't think it moved; it washed a pier away, then it sunk. All that water that I have been describing didn't run through or over or by that bridge; the water I described is just the water through Ash Coulee. Ash Coulee runs into the Beaver about  $\frac{3}{4}$  of a mile above the steel bridge—above the bridge that sunk.

Q. All the water you are talking about, except

(Testimony of August W. Moline.)

what soaked into the ground, went by that bridge, that one end sunk 5 or 6 feet?

Mr. McCARTHY: Objected to as repetition.

Q. We want to get at it.

A. I was talking about Ash Coulee and you were referring to Beaver.

Q. But all the water you were talking about, as having formed near your place, went under or around that bridge, except what soaked in the ground?

A. It had to go there.

The water from Abram's place had to go by that bridge. The water Bryson was talking about went by that bridge. I don't remember how big that steel bridge was; I don't remember how long that bridge is; I crossed it lots of times, but I don't remember it; it was quite a large bridge. [281]

Q. It was mostly wood and steel and——

A. Steel and concrete and——

One of the concrete piers went out.

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CHARLES M. LUND,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy):

My name is Charles M. Lund. I live 28 miles south of Wibaux, 20 rods east of Beaver Creek up

(Testimony of Charles M. Lund.)

on the bank. My house is not on a level with the creek; it is up high; the house is about 38 or 40 feet above the bed of the creek. I have lived there 25 years. I was at home the night of June 6th and morning of June 7th 1929. Referring to exhibit Y-13, that is the location shown on there; where the name "Lund" appears is approximately correct as to the location of my place,—32, that is correct. As to a tributary of Beaver Creek, east of me there is East Fork you know, that empties into Beaver Creek; that flows from the Carlyle country and it flows southwest; it empties into Beaver Creek south of my place a little over a mile, straight across. My business is farming.

On the night of June 6th and morning of June 7th we had a storm at our place. About 11:00 o'clock the night of June 6th we had an awful heavy rain—the hardest rain I ever seen there since the time I was living there and it was an electrical storm—very bad—and the water just came down in torrent on the flat below me, that section 31, the main channel of Beaver. I looked out and in a flash of lightning I could see water across the flat a distance. The water wasn't still in the creek bank at that time, it was all over the flat. In width it varied from half a mile to  $\frac{3}{4}$  to a mile in a couple of places. That was about daylight I went down and stood on the creek bank; I would call daylight about 3:00 o'clock in the morning. About 3:00 o'clock I got out [282] of the house to look around, I went



(Testimony of Charles M. Lund.)

down on the creek bank and stood there and watched it, and there was water all over the flat; and on section 36 west of me, there is a valley comes down that drains quite a territory from the west. The water kept coming, tumbling down; it looked like a snow-bank or waves or whatever you call it; and there is another section that it come tumbling down and come on into Beaver flat. I would say that water wasn't still; it was traveling at a very rapid rate of speed. The rapidity at which that water was moving would be hard to say; it was traveling very fast. I couldn't keep up with it walking. I don't know how fast I can walk; I used to be a pretty good walker; about four miles an hour I think I could walk. It certainly was traveling that fast—four miles an hour—of course I am not certain. My judgment is that it was certainly traveling that fast anyway. That water I saw didn't move along the course of the creek or wander across the way the creek does; it cut straight across the country, across the valley. It would vary in the distance how far it was cutting across the turns there and going in a straight line; I couldn't just say, but you know, it cut off all the crooks and bends of Beaver Creek anyway, and it was coming across the flat on the west side anyway as far as I could see. I can see about two miles, probably a little better, from the west of my house. Compared with any storm out in my country during the 25 years I have

(Testimony of Charles M. Lund.)

been there, this storm was the most water we had ever had.

Cross Examination:

(By Mr. Colton).

I live about three miles straight across from Abrams. I never went to bed, I stayed up all that night; I was nervous. It was the highest at my place from 3:00 to 5:00 o'clock in the morning. This water I saw coming tumbling down from the hills toward the west was coming towards Beaver Creek, not in a dry [283] draw, it is not a draw; it is kind of a valley slope on the side; well, it headed for the flat. Naturally, the east side of the section where the creek travels, the land is lower, but there is water clear across there, one mile across. I saw the water coming over those flats there at 3:00 o'clock in the morning; I was looking towards it; it was heading into 31.

Q. Counsel asked you if it was going along the meanders or oxbows, or straight across. Could you look and see if the water was going straight across looking at the water in the creek, or to the outside? Could you tell whether it was going at the same rate of speed?

A. No, I could not.

Q. You couldn't differentiate the difference between the water in the stream proper, and the water outside the banks of the stream?

A. It was all traveling plenty swift. I didn't pay much attention at that time whether there was

(Testimony of Charles M. Lund.)

any difference in the stream; I was thinking about different things that morning.

There is a bridge close to my place. That is the bridge across the main channel; I heard Mr. Moline testify about it. All of the water from Ash Coulee and all through there, comes through that bridge, as long as the water stays in the bank; it has got to come up that valley by the Beaver, certainly.

Q. Some years past there was a pier that was washed out in the 1929 flood that was damaged a year or two before that?

A. No, sir, not on the east,—on the west side. I don't know an awful lot about it. I do know that in 1925 it was damaged on the west side and they cemented it in there on the west side. That was damaged some years before this flood; I couldn't recall the year, I remember when it was. During the morning of the flood after the flood subsided, my son drove over that bridge. To the west of Beaver Creek where the water comes down over 36, as I testified to, there is no road that comes down there; it is just prairie. During the year 1925 I lived down in that vicinity; I lived right [284] where I live now. I have seen a scene like that (in plaintiff's exhibit X-7); it must have been in 1925 if I remember right. I can't recall who that is on the horse there. This picture was taken—it was down on the flat, 31; it looks like the flat of 31 below me. It isn't so very many rods from my place. It is



(Testimony of Charles M. Lund.)

right near Beaver Creek on the west side of Beaver Creek.

Mr. McCARTHY: No objection.

The COURT: It may be received in evidence (X-7).

During the year 1925 we had quite a flood down there. The flat around my place wasn't all covered; the creek was out of its banks. It went up quite a ways on trees.

I told counsel I never saw it rain as hard before at my place as it rained on the night of June 6th. I have seen it rain awful hard before, but not for such a long duration; I have seen it rain hard for a short duration, for 20 minutes. I have seen it rain just as hard as I seen it on June 6, 1929, just for a short period, right at my place. I have seen it rain and move rocks at my place, enough that a man couldn't hardly lift; I can't recall the year I saw that. We have had severe cloudbursts and very heavy rains in the vicinity of where I live and in the vicinity of where Mr. Abrams lives and Mr. Moline. In 1912, we had the heavy rain; I think it was July 3, 1912, if I ain't mistaken. It was a very heavy rain; the creek left its banks. That is about all I can say about it. I haven't the slightest idea of how many inches of rain fell at that time. I wouldn't know what to say as to what fell on June 6th, 1929,—June 7th; it was an awful lot, that is all I do know. I have no way of telling, you see. There was no storm there in 1917 that I know of.

(Testimony of Charles M. Lund.)

I have seen evidence of high-water marks of a flood that occurred before I went to that country. I couldn't say what flood that was; it was before my day. I don't know as to the marks of that flood being higher at my place than the flood of [285] 1929. Of course, that is quite a few years ago. But I saw the high-water marks of that flood at my place when I moved in there in 1909. Those marks were somewhat higher than the flood of 1929, but evidently, those trees would have grown some, but the marks were in the trees and those marks were higher, I think, than the flood of 1929; it is pretty hard for me to say how much higher; it would be guess-work if I do,—possibly a foot and a half to the best of my judgment. I have heard about that flood occurring in June, 1907.

Q. You don't think those trees grew two feet in two years do you? Do you think the marks raised right up?

A. Well, that is 27 years ago.

#### Redirect Examination:

My idea is that the high-water marks of some flood in the vicinity of my place before I moved in there, left some sort of a mark on a tree, and it is my idea that that tree grew, so that in 1929, 20 years after I had been there, I figure the mark had come up as a result of the growth of the tree.

Counsel asked me about there being lots of water in the vicinity of my place in 1925, and I said "there was lots of water there in 1925," and I said

(Testimony of Charles M. Lund.)

“but”—; I wanted to make a comparison. There used to be some old straw piles down on section 31; that is what I gauged the water by. The 1925 water, it went down to those straw stacks, and in 1929 the water was all over that flat.

Q. How about 1929 (1925?) ?

A. That was just a heavy rain and the creek filled up and it started to take off to the sides. I spoke of the duration of the storms. As to this rain of June 6 and 7, 1929, in the vicinity of my place, it poured from 11:00 in the evening until break of day in the morning.

**Recross Examination:**

I said those straw piles were there in 1925; the same straw piles were not there in 1929. [286]

**Redirect Examination:**

As to how I was using those straw piles as marks, those old straw piles were there for several years. When this water came in 1925 it went down to the straw piles. In the flood of 1929 the piles weren't there, but the whole flat, section 31 where it was level, was covered with water, but I am using my straw piles as marks as to the location.

**Recross Examination:**

Q. You live right close where Ash Coulee and East Fork enters into the Beaver? Those two tributaries enter in close to your place?

A. Ash Coulee empties into Beaver one mile



(Testimony of Charles M. Lund.)

south of me and East Fork comes from here and enters about a mile south.

Redirect Examination:

Ash Coulee flows from west to east and the other coulee from east to west.

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J. M. SHEA,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is J. M. Shea. I live about 15 miles south of Wibaux. I am farming. I have lived at my present location about 14 years; have lived in the Beaver Valley about 25 years.

I was at home the night of June 6th and morning of June 7th. My residence is right on the west bank of Beaver Creek. It is about  $\frac{3}{4}$  of a mile downstream from where Lane Steer enters into Beaver Creek. That flows into Beaver Creek from the southeast—flows from the south and the east. We had a storm over in our country the night of June 6th and morning of June 7th.

Q. Will you in your own way, describe that storm to the jury?

A. The afternoon of June 6th it rained hard from about 3:00 to 5:00 o'clock, and I was under the impression that it rained most [287] all night.

(Testimony of J. M. Shea.)

Mr. COLTON: We move to strike that—the last part of that answer—“under the impression it rained all night”.

The COURT: Well, it is hardly responsive.

The night of June 6th I think I went to bed about 9:00 o'clock. It was raining at that time. After I went to bed, I couldn't give you any idea as to the character of the storm—whether it was light rainfall or heavy or what. Just prior to the time I went to bed it hadn't rained so hard as it had in the afternoon. In the afternoon it was the hardest rain I had ever seen. I got up about 3:30 on June 7th. When I got up I found the water was close to the house at that time, so I began to move out. My house was about six or eight rods from the creek bank. I would say the elevation of the ground at my house was about 20 foot higher than the bed of the creek. When I got up the water lacked perhaps four feet of getting up where the house was at that time; it wasn't within four feet of the house or four feet from the house; it lacked a raise of about four foot. While I was up there the water kept raising; it was raising quite rapidly. Giving the court and jury an idea of how rapidly the water was raising, will state that I left there in about half an hour after I got up; by that time the water was all around the house. It had to raise four feet to get up to the house and in half an hour I left and by that time, the water was all around the house. I mean that by that time, the water had come up

(Testimony of J. M. Shea.)

four feet in half an hour. Taking the highest point there when I left, the width of the water across the valley must have been about 40 rods I would say. That water wasn't standing still; it was flowing. I would say it was flowing a little faster than a man could walk. As to the rate of speed I have in mind for a man walking, I believe four miles an hour would be fast walking. I think the water was going perhaps a little faster than that. I couldn't say how [288] much faster than a man walking at four miles an hour, but just a little faster.

My hogs woke me up that morning. The flood moved a number of buildings at my place. It moved one granary that had a little grain in it, about 20 rods. It is 14 by 20 and a 14-foot chicken house built on one end. Another building moved was a small granary. There was also a small barn moved; the barn was moved about 10 rod.

I pointed out the high-water marks later to Mr. Oien. I was living at the same place in 1921 that I lived at in 1929. We had high water in 1921 at my place. The water was much higher in 1929 than it was in 1921,—I believe it was 12 or 13 foot higher. The storm of 1929,—the flood I saw there in June of 1929, was much higher than any other water I had ever saw.

#### Cross Examination

(By Mr. Colton).

I was under the impression that the 1921 flood didn't extend very far south of my place. I don't



(Testimony of J. M. Shea.)

know anything about the extent of the 1921 flood north of me to Wibaux and east of me to Medora; I was under the impression that the bulk of the storm was north of my place, and I don't know how far that flood extended east. I wasn't in Wibaux during the 1921 flood and I don't know anything about the condition of the town of Wibaux during the flood of 1921. I wasn't in the country in 1907. I have lived there on Beaver Creek 25 years, not all that time where I am now. I have lived south of Wibaux on Beaver Creek 14 years.

There is a wooden house—frame building—at the bend of the creek southeast of my place that was there on June 7, 1929. That building was torn down; it has been taken down. That was a wooden building. On June 7th that was four or five rods from the banks of Beaver Creek. The water of June 7th moved that building a few [289] feet. It was setting on rocks, and a wooden building. As the creek goes by my place, there are three banks right at the house, and my house is setting on the third bank. I made the statement that that bank was 20 foot above the bottom of the creek; that is my estimate; I never measured it. My house doesn't set on the second bank of the creek; it is on the third. I don't know whether the third bank is a defined bank; it is a bank to the stream, and my house is right on the same level with the top of that bank.

It must have been about 4:00 o'clock when I left the house that morning. The direction I went was

(Testimony of J. M. Shea.)

north a little ways, then west. I drove through water. The water was just about to the running-board on the car. The water was running fast. I couldn't say whether it was running as fast as the water in the creek right by my place; I wouldn't imagine it was though. My house is right on the valley level. So when the water got high at 4:00 I got in the car and drove away. It must have got higher after I left, perhaps a foot higher. I imagine the water was 12 or 14 inches deep when I drove through it. The average depth of the water at my place over the fiat there would be more than two and a half feet, I would say six inches more anyhow. I was driving a Ford car that morning. I left at 4:00 o'clock and I drove that Ford car from my place towards higher ground. That water didn't get up on my engine. When I drove through it, the water was up to the running-board of the Ford car. I didn't see a wall of water coming down.\* It is about 15 miles.

Q. Now, under ordinary high water in the creek, the creek comes bank-full at your place, how long does it take that water to get to Wibaux?

Mr. McCARTHY: Objected to, unless he is going to tell whether the water stays in the creek or cuts across the bends. [290]

I have seen water bank-full at my house.

Q. How long did it take that water to get to Wibaux?

Mr. McCARTHY: Running at what speed?

(Testimony of J. M. Shea.)

Q. That is what we are trying to find out. How long did it take that water to get to Wibaux?

Mr. McCARTHY: Objected to as indefinite, unless he gives the speed of the water.

Mr. MAURY: That is what we want to find out. I have seen the water at my place bank-full.

Q. Have you observed, on any occasion, how long it took that water to get to Wibaux?

The COURT: Were the banks full or overflown?

Mr. COLTON: Banks full.

Mr. McCARTHY: Objected to as immaterial as far as this case is concerned.

The COURT: Let him answer the question.

A. About fifteen hours, I have noticed it, it would take it.

#### Redirect Examination

The water wasn't moving in the banks on the morning of June 7, 1929, when I got up; it was cutting across. When I left my place in the Ford car, I took my family with me.

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#### JOHN EFTA,

being first duly sworn as a witness in behalf of the defendant, testified:

#### Direct Examination

(By Mr. McCarthy).

Mr. MAURY: To preserve our record, your Honor, in view of the testimony of Mr. Shea that



(Testimony of John Efta.)

it took fifteen hours for water going bank-full, in going from his place to Wibaux, we move to strike out the testimony of every witness of the defendant so far, because it shows the conditions are not similar; that it could not possibly have had any coadunation [291] of the flood at Wibaux that took place, and it was entirely concluded before 1:00 o'clock on the day of June 7th.

The COURT: Motion overruled.

Mr. MAURY: Exception.

I live 22 miles south and one mile west. I have lived in the Beaver valley 26 years. I was in Wibaux on the afternoon of June 6, 1929. I started for home about 4:00 o'clock. I did not get home, because the water was too high; I couldn't cross the bridges on the Wibaux road. I went south when I left Wibaux at 4:00 o'clock; went 11 miles south before I stopped. When I found I was stopped because of the water condition, I just backed my car on a higher spot and I walked east one mile to Robert Wicke's ranch. Robert Wicke's house is located on section 36—15—59. On defendant's exhibit Y-13, where the name "Efta" appears, that is where Mr. Wicke lives. I got to Mr. Wicke's place about half past five. My business is farming. The Wicke house is on the west bank of Beaver Creek; it is about 200 feet from the creek. The house is about 7 foot above the bottom of the creek. I stayed on the Wicke place that night. Something happened that night of an unusual nature in the way of a

(Testimony of John Efta.)

storm. When we got to Wicke's place, we stayed there for an hour or so and then I went back to the car. By "we" I mean my wife and I. I went back to the car to lock up the car and when I come to the car, the water was down on the Wibaux road and then I walked back to Wicke's place about one mile, after my wife, so we could go home and when I got over there, there was a dry creek on the west side of the house that just was filling, and kind of a dry swale, dry creek,—and I got to the house and I told my wife we could go home, and I turned around and the dry creek was half-full and we couldn't cross it. We decided to stay at Wicke's because we was compelled. During the night, the water was raising all the time slowly until 12:00 o'clock. At 12:00 o'clock the water [292] begins to get in the house already and I didn't went to sleep; I was watching the water, and I told my wife, I says, "We will have to move to the barn from the house" because the barn was higher than the house, on higher ground, and we waked up his hired man and at 12:00 o'clock at night we walked into the barn. He was Robert Wicke's hired man. The Wicke's weren't home at that time; his home is in North Dakota; he had a hired man over there at the place to take care of the place. I woke up the hired man and my wife and I went to the barn. When we went to the barn, it was raining awful heavy. We got to the barn. The barn was 200 feet I should judge from the house. I should judge the

(Testimony of John Efta.)

elevation of the ground the barn rested on was four feet higher than the elevation of the ground that the house rested on. We stayed in the barn the rest of the night. I got up about 4:00 o'clock in the morning and went outside and the water was just about two feet from the barn already at that time; it was up to within two feet of the barn. When I got out in the morning, I was watching the water about two hours, until 6:00 o'clock, and at 6:00 o'clock I looked towards the south and the water making kind of a funny move, and I looked towards the south and it got kind of dark and I looked a little closer and I saw kind of a wall or wave of water about six feet high, and I jump in the barn and told my wife we would have to move up in the hay-loft and as soon as we got in the hay-loft, the water was about four feet in the barn—came up to the height of four feet; that is, four feet in the barn. Buildings or property of Mr. Wicke's was moved; there was a granary 16 feet wide and about 30 or 35 feet long—that moved. There was some grain in it, but I don't know how much. That granary was moved, I would judge, about a mile and a half. Some other property was moved there—some small buildings. We got home June the 8th, after dinner.

Q. Before we get to that, what time were you able to get out of [293] the barn?

A. The same day,—the 7th of June. I get out about from 5:00 to 6:00 o'clock, I could walk around the barn,—in the evening.



(Testimony of John Efta.)

I got home on June 8th. As to what damage, if any, I found had occurred at my place, there was a lot of fences tore up on the Beaver Creek and washed out a lot of grain. I had a steel fence at my place,—steel posts, and the steel posts were set down in the ground. There was around 30 or 35 of those steel posts broken even with the ground.

### Cross Examination

(By Mr. Maury).

Frank Miesoloski's is the next house downstream from me—from where I was that night at Robert Wicke's—he is below that Wicke's ranch. After Miesoloski, going towards Wibaux, it is Ronellenfitsch next. The next house towards Wibaux, below Ronellenfitsch is Phillip Zinda's, and Mr. Brophy's comes next. Clem Parker is next after Mr. Brophy, and next after Clem Parker is Joe Burke; then it is Wibaux. Massey's ranch is in there; it is close in Wibaux.

Q. Coyne lives across the river?

Mr. HALL: Across the creek.

Q. Across the creek or river; it is a river. Do you know about that?

A. I don't know.

It is 11 miles, something like that, on the road, from where I was, Robert Wicke's place on the night of June 6th, to Wibaux. That is pretty hard to say how far it is by the meanders of the stream. Whether it is approximately twice that far,

(Testimony of John Efta.)

it couldn't be answered, because it has got to be measured; I can't tell you. It has got to be measured before I could tell you. It is way farther on the meanders of the stream than on the road—than straight across. I wasn't on Duck Creek; the creek I was on they call it Dry Creek; I haven't got the name of what I am on. [294] It goes into Beaver Creek. Miesoloski is on the main Beaver Creek. That wave or wall of water went towards Miesoloski's. I didn't notice it when it passed Robert Wicke's; I just noticed it when it was coming in to Robert Wicke's ranch. I should judge I could see it for a distance of about 200 feet. The length of that wave was varying; there was places it was half a mile and places it was about  $\frac{3}{4}$  of a mile. I should judge it was, at the nearest point to me, from five to six feet high. Having been shown plaintiff's exhibit 22, that is in Wibaux—this side of Wibaux. That wave that I saw up at Robert Wicke's looks something like that, but it was from five to six feet high, but it was showing just like this,—showing something like that, but from five to six feet high.

Q. Come over here and show the jury what you saw that resembles that there?

A. It resembles the formation of the water like this (in exhibit 22), but it was from five to six feet high, rolling. I see something here that resembles it. It is pretty hard to tell from the picture how high this was, when you don't see it

(Testimony of John Efta.)

moving,—that is to give you an idea of my measurements. As to how fast it was going, I should judge it was 200 feet from the barn and I had just enough time to jump in the barn and got on the manger and there was four foot of water already in the barn. There was no minutes; there was only one jump.

Q. You came from that place to Wibaux soon after that? How soon after?

A. I left the place in the morning of the 8th.

Q. Which way did you go to Wibaux?

A. No, I went to Charlie Walters', west about two miles.

There was a second rise of water there on the afternoon of June 7th; it was around 2:00 o'clock in the afternoon of June 7th that it rose; I could judge that it rose about two feet. Before the second rise came, the first rise went down about three or four feet. I would say that the first rise above the ordinary [295] low-water level was about 17 feet high; then it fell back in a rough figure—I could figure from three to four feet; then it rose again about 2:00 o'clock, about two feet. It didn't stay up at that second rise; it just rise, then it was gradually going down. As to how long it was before it got back to the point where it had fallen three feet—say 14 feet high above the level of the creek—will say that the water went down about 6:00 o'clock in the evening, it went down about four feet.



(Testimony of John Efta.)

Q. Then, at 6:00 o'clock that evening, it was still 13 feet above? Do I understand that? Or was it down to four feet?

A. It went down about 6:00 o'clock, June 7th, in the evening, it went down to four feet.

Q. Down to four feet high above the creek level?

A. No; by the barn, from 17 it went down to four feet.

Q. Down to four feet?

A. Only four feet went down.

Mr. COLTON: To 13.

I was looking at that carefully. I could make the measurements after it finally receded, to correct my own views, and the first rise was to 17 feet above the creek bottom. That stood there at 17 feet; well, the 17 feet probably stand little over an hour—even. That hour was about 7:00 o'clock, then you see the water began to go down.

The COURT: Is that 7:00 in the morning?

Q. That is 7:00 o'clock on the morning of the 7th, isn't it?

A. Yes, sir, it begins to go down. It reached the peak—it reached the top about 6:00 o'clock in the morning, June 7th, at the place where I was; that was the highest spot that time. That was the highest water I saw there at all; then it stayed that 17 feet for an hour, and that was about 7:00 o'clock; then it fell back—it was gradually going down. Then there came a second rise. That second rise came at 2:00 o'clock, after dinner. The water rised then

(Testimony of John Efta.)

about two feet. It didn't go up to where it was [296] standing at 16 feet; the morning water was down from three to four feet from the top. It raised two feet when it came back at 2:00 o'clock. It is my best memory than then it stood at 15 feet high, something like that, about 2:00 o'clock in the afternoon. It started going gradually down right away. It was inside of an hour I believe, that the water was down to 10 feet high, that is by 3:00 o'clock; and by 4:00 o'clock the water—it was about one foot in the barn yet; that would be about 14 feet yet above the bottom of the creek. That was around about 4:00 o'clock it was standing one foot in the barn, in the afternoon of June 7th. As to when it left the barn completely—got down to 13 feet,—it leave the barn a little after 5:00 o'clock. A little after 5:00 o'clock, it was about I would say around 12 feet high yet. I didn't watch it until dusk came on—9:00 o'clock; I couldn't tell how high it was about 9:00 o'clock; I went to sleep—I was tired. Naturally, that wave or wall of water was across the valley. As to whether it was irregular, the marks irregular—up and down, or whether they were all on a level—it couldn't be on a level because they raised in the barn at a sudden, four feet.

Q. Did you take note of the water marks down around Parker's place?

A. No, sir.

(Testimony of John Efta.)

Q. Would you say that that phenomena that you saw could possibly have gotten to Clem Parker's place?

Mr. McCARTHY: Objected to as speculative—this man's guess as to whether it could or not. It is for the jury.

The COURT: Well, what the man knows. How far is Parker's place?

A. Parker's place is seven miles from that place.

I have never seen a phenomena like that before.

Q. Have you seen the results of them in that country, of some phenomena, where in an afternoon there would come down from a [297] coulee a large body of water and pile hail as high as five feet in a fence corner?

A. Well, I see a lot of trash along the creek, trees and fences, something like that, piled up by a storm all of a sudden—I couldn't say if five feet high—but I see a lot of trash. I didn't see that piled up all around by the storm.

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Testimony of

CHARLES C. HOLSTEIN,

who had been first duly sworn as a witness in behalf of the defendant at the trial of Case No. 2444, Wibaux Realty Company, a corporation, (and other cases) vs. Northern Pacific Railway Company, a



(Testimony of Charles C. Holstein.)

corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 12th day of January, 1934, was read at this time by the court reporter, as follows:

“Direct Examination by Mr. McCarthy:

“My name is Charles C. Holstein. At the present time, I live at Beach, North Dakota; I maintain my residence at Beach. I was living at Beach in June, 1929, but as far as my business is concerned, I am out at the farm about all the time. My farm is on section 21-13-60. With reference to Wibaux, it is about 12 miles southeast or such a matter. My farm is located on Duck Creek stream. Duck Creek starts about straight south of Beach, I should judge about seven miles, such a matter, and flows past my place and empties into the Beaver about three miles beyond, flowing northwest like. The junction of Beaver Creek and Duck Creek is just about three miles northwest of my farm.

I was on my farm June 6th and 7th, 1929. We had considerable rainfall on June 6th. It rained real hard on the 6th day of June and about sun-down the creek was about its highest that I had ever saw it before. Duck Creek is all of eight miles long, perhaps a little longer. On the afternoon, or towards evening, of June 6, 1929, it rained at my place. It rained very heavy, at [298] least in the afternoon, and about sun-down it pretty well let up. Well, the creek at that time was about as high as it usually

(Testimony of Charles C. Holstein.)

gets at a heavy waterfall. I went to bed about 9:00 o'clock, and it didn't rain any more until then, that is between 6:00 and 9:00; it quit raining from about 6:00 until sun-down, until 9:00 o'clock, and I went to bed, that is at 9:00, and I heard it raining pretty hard, and in the morning I got up about 4:00 o'clock and I went and looked out the window and I seen I was thoroughly surrounded by water. By "surrounded" I mean, the location of the building is at the high point at the flat there and so far, it hadn't been troubled with any overflow of water from the creek. We moved down there in the spring of 1908; that would be about 20 or 23 years that I had been operating that farm—that place. And at this time the flat was covered with water at the depth of about three feet—at least that was the point around the buildings, and about 80 rods each side of the building. It took about two miles of woven-wire fence and destroying a lot of other fence with it. I have mixed stock—cattle, horses and sheep. It took 240 head of sheep. The water came along and picked them up and packed them along; I mean that 240 sheep were drowned or lost,—they were gone; they were distributed all along my place, perhaps up to Wibaux. I didn't see so very many; I didn't see only half a dozen between my place and the Beaver Creek junction. I saw some of them beyond the Beaver Creek and Duck Creek junction to the north; there were a whole lot of them I never got to see at all.

(Testimony of Charles C. Holstein.)

Q. Now, Mr. Holstein, where is your house located with reference to the creek bank, as to the elevation? Let us take it from the creek. How far above the creek is the bench there opposite your house?

A. I would judge from the creek about four feet up to the level of the house. The height of the house above the bench of the creek is about three feet,—well, it is on a foundation of about three feet. On the morning of June 7th, as far as the house [299] is concerned, the water was up about two inches on the joist of the floor. As far as the place is concerned the water had never before overrun the place at all.

Cross Examination:

(By Mr. Colton).

I had never seen the water all over the flats there exactly, several times before—not at the point of the building,—place. I have seen water there over that flat east and west. I have seen water out of the banks of the creek since I have been there, but not where the building is. I have seen that phenomena occasionally. I had about 375 sheep in that band and there were 240 of them lost. As to where those sheep were in the night: In the evening, as a rule, they would come and they would bed at the bank of the creek there, but this particular evening—on June 6th—the water getting quite high, I suggested to the men that we take them over on



(Testimony of Charles C. Holstein.)

the higher ground about 100 rods from the building north, but they evidently didn't take them over there, because the water hadn't been that high during the night.

Q. And this rush of water caught those sheep close to the banks of the creek?

A. They shouldn't have been there. I told them to take them about 100 rods away from there. They were on lower ground than the floor of my house. As to the distance that my place is from Wibaux, following Duck Creek to where it would enter into Beaver, I presume it would be right about three miles where it enters Beaver. From the point where it enters to the bridge at Wibaux, I imagine straight across about eight miles. That would be about 11 miles altogether.

The first I noticed high water at my place was 4:00 o'clock June 7th, when I got up—that is when I seen the high water. It wasn't at its extreme height any more at 4:00 o'clock; it had gone down perhaps three or four inches when I first seen it. The water did get into my house—the basement was filled—It didn't [300] *didn't* get into the house; it got onto the stringers of the house, the joists. My house is about seven foot above the bottom of the creek.

#### Redirect Examination:

When I got up that morning, this water that I saw there was moving quite rapidly in a north-westerly direction. It was following straight across,

(Testimony of Charles C. Holstein.)

northwest slope. I mean it was moving straight across the country; it didn't follow the channel; it just followed right on through. I never lost any sheep or stock in high water before.

Recross Examination:

I wouldn't have lost any this time if they had stayed up on the high ground; if they would have stayed where I placed them, they wouldn't have got caught.

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JAMES LINN,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is James Linn. I live six miles south of Wibaux. My business is farming. My house is half a mile west of Beaver Creek. I am on section 11 and Beaver Creek is on section 12. I have lived where I now live 23 years. I was at home on the night of June 6th and the morning of June 7, 1929. We had a storm or water out my way. Describing that storm and high water at my place on the dates mentioned, my boy woke me up about a quarter to 3:00 o'clock, with a noise—noise from the creek. It was rumbling and rumbling quite a lot; you could hear it. I woke up and looked out through the window and I thought it was snowing from the looks of the water, so I

(Testimony of James Linn.)

had to go around and see about some stock I had and I took a walk down the road a little ways, my son and Joseph Kohl, and as I went along the road, it was [301] raising right along, the water was raising right along. When I got up and looked out the water was outside of the Beaver Creek bench a long ways, both sides; it would be out on the west side and it was over on the east side out too. My best judgment as to the width of the water there when I got up is that it would be half a mile wide. My son and I started out to round up the stock and so forth, there.

Q. What happened to the water? Did it go down or up, or——

A. Well, it stood still for quite a while going along there and I wasn't watching the water particular, but I could see the marks of what happened right along, it came out to the roadside; it forced a hay rack along to some boys that was camping and up to the roadside. As to the time that that occurred, I went down to the place about 6:00 o'clock and that hay rack and stuff was coming over to the roadside and I said to the boy, "We better get on higher land," but it didn't cross the road. When I got up and saw this water half a mile wide it was moving pretty fast. I couldn't give you any idea how fast it was moving, for I wasn't paying much attention to it.

Q. What have you to say as to whether this water that was moving that you speak of there,



(Testimony of James Linn.)

whether it was following the course of the stream or what it was doing?

A. Well, it was taking a lot of land with it and rolling it right along. I lost 40 acres of barley and two miles of fence.

Mr. MAURY: Will your Honor charge the jury at this time to disregard that?

Q. What I had in mind Mr. Linn, was whether the water was following the twisting course of the stream as it ordinarily does, or whether it was cutting straight across?

A. Well, it was following the creek on both sides.

Q. Well, was the water taking the bends of the creek?

A. Oh, yes; and the water was coming up on the high places and going down [302] in the low.

Q. It was coming up in the high places and going down in the low?

A. Yes.

Defendant's exhibit P is a typical section of the barbed wire that was twisted up in the manner that I have referred to.

Mr. McCARTHY: Defendant's exhibit P is offered in evidence.

Mr. COLTON: No objection.

The COURT: It may be received.

Q. On the east side of the road and south of your house, is there a grove of trees there Mr. Linn?

(Testimony of James Linn.)

A. It would be on the east side of the creek the grove of trees. The high water went up about eight feet high on some of those trees and it tore quite a lot of them out by the root; those were live trees that were pulled out; they were box elders. Those trees were eight inches likely—some of them eight or ten inches through, I mean eight or ten inches in diameter.

Cross Examination:

(By Mr. Colton).

Those trees were situated east of the creek. I could see the trees from where I was. I seen the flood tear them out—I see them go down right along. In some places the creek runs about half a mile east of my house, you understand,—because it bends you understand; right opposite my house it runs half a mile. In connection with my house, those trees were further south. I didn't get off of the main road that morning; the main road would be about 60 rods from where those trees stood. The trees that were rooted up didn't come out to the main road, they went on down the creek to the next fence or likely fastened in some of the fences. I seen some trees coming down there that morning,—those trees that I said were uprooted on the east side of me. They were a cluster of trees. If you never heard that before, I [303] can take you down and show you and prove it.

(Testimony of James Linn.)

Q. You testified at a trial two years ago in the case of Heckaman vs. Northern Pacific, tried at Baker about two years ago—a little more?

A. I was down there. I didn't tell you anything about those trees at the trial. That is all right—it is because you didn't ask me the question.

As to what time the water went down at my place that morning: Mr. Colton, I told you I was busy and I couldn't pay attention to it. I had something else to do besides watching that at the roadside. I was busy taking care of my own stuff. The water wasn't off of the flats at my place until 3:00 or 4:00 o'clock in the afternoon of June 7th 1929. I wouldn't be certain how deep it was all over the flats at 3:00 or 4:00 in the afternoon, but in the morning it went over the fence posts. I wasn't keeping any track of when this water was coming up or going down, because I had a little more else to do. There wasn't anyone down the valley the afternoon of June 7th who telephoned or sent warning to people of Wibaux to look out—that there was another flood coming up there on the afternoon of June 7, 1929; there wasn't any telephone going at that time, because it was washed out. I didn't go to Wibaux.

I couldn't tell you exactly how high my house is above Beaver Creek. That road I live on runs west at Beaver Creek and that road is on about the same level as the flats; of course, the road is somewhat higher, you understand, as it comes



(Testimony of James Linn.)

through there. My wife called up—she called up Wibaux and she couldn't get them; that must have been before 3:00 o'clock in the morning—about 3:00 o'clock. I live six miles south of Wibaux. At 3:00 in the morning, we had a terrific flood at my place south of Wibaux, and at that time we called up Joe Burkes, and at 3:00 my wife called up the folks at Wibaux. That is at 3:00 o'clock in the morning. [304]

Redirect Examination:

Comparing this 1929 flood of June 7th with any high water I had ever seen out around there before, will state I wasn't paying any attention; I never noticed any high water; I was out in the field; I didn't pay any attention. I have seen it up even with the bench—even with the banks—that would be even with the bench, wouldn't it?

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JOHN B. BROPHY,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is John B. Brophy. I live at Wibaux, that is Wibaux County,—5½ miles south of Wibaux. I am right on the banks of Beaver Creek. The creek proper is about 200 feet from the house

(Testimony of John B. Brophy.)

on the west side, and about 300 feet on the north side; it curves around my place. I have lived at that present location since 1887. I lived at my father's ranch in the Beaver Creek valley in 1882.

I was at home the night of June 6th and morning of June 7th, 1929. We had lots of water at our place. To tell about the condition of the water at our place, just what occurred and when it came up, is a very long story: At the time we retired—I stayed up all night myself,—all night until 20 minutes to 3:00 in the morning; that was the night of June 6th and early morning of June 7th, and my family retired about half past 9:00 and after that, I stayed up alone and took a flashlight I had to go out and examine the creek; I had kind of gauges there to see if it was raising or falling or what, and it was coming up steady all night, until 20 minutes to 3:00 I went in the house, and I worked pretty hard the day before and I just told my family I wanted to get in a few hours' sleep if possible, and they said, "Very well, we [305] will all watch." I could see it was a very dangerous stage at that time (that is pretty hard on me to talk louder; my throat is affected with laryngitis; I had an operation). All right, I will do the best I can: they said, "We will stay up and watch," and so I went to bed and as I remember, after I went to bed, I didn't go to sleep right away. I had a very heavy coat, but notwithstanding that, I got wet nevertheless, and it was raining quite

(Testimony of John B. Brophy.)

hard and it whipped that rain into a spray and it almost would go through a board, and after I laid down, I noticed it was breaking day and the birds started to sing, and all night long, it was thundering; it seemed to be about eight miles south-east of my place. In fact, it was the heaviest thunder—it shook the window glass in my house that distance, and it was raining very hard. As to whether at daybreak the water was still in the banks of the creek, or describing the situation: when I retired it was about eight inches under the banks, and I hadn't retired I don't believe an hour, and to be exact about it, I think it was about half past 4:00 and it was sun-up, and that was about the time of the longest day of the year, which would be half past 4:00, sun-up; and at that time, something struck the house and there was a great commotion, and I looked out the bedroom window and the water was just coming through the yard about 3½ feet high, and it seemed to have a rolling motion,—dead animals and hay stacks and everything else, and the situation after I woke up so sudden, it didn't look very favorable to me, because the water was just white with hail. As to how much hail there was,—it was broke up, one was trailing the other through, and then there would be two feet there would be none at all. Some of these things I saw floating were dead sheep—quite a few of them—and a few dead yearlings and two-year-old cattle, and dead horses, and there were



(Testimony of John B. Brophy.)

lots of hens. The water wasn't standing still,—it was moving very fast. The first movement of that water at my [306] place about daybreak, was slower than after for the reason that it filled all that low depression; it kind of diverted it a little, it kind of checked it a little. The width that it was across, at its widest place,—at my place, I would call it fully 3,000 feet or more; it was over half a mile.

The first thing that occurred to me was to get out and see if any passage was left open, and “beat it” before every passage was surrounded. I thought of the big butte not far off, east of my place, and I rushed out the door after I woke everybody and I went out 50 feet from the side-door, and I noticed my family was following me up and I told them to stay in the house until I got back. I couldn't see clearly to the east side to see—When they woke up and decided we better get out of the house—I didn't stop and dress, I got out as quick as I could. At that time, I didn't take time to put on my shoes or anything else; I just picked up a pair of overshoes to protect my feet after I got outside; I had on just my underwear. When I got out, the only place to go—the only thing available was where we dumped the ashes; we had been dumping there for quite a few years and it created quite a pile and that was the only thing visible. For some time I stayed there on the ash pile; at the ash pile, there was quite a lot of sod and earth. I didn't stay on the ash pile the

(Testimony of John B. Brophy.)

rest of the day. At the height of the flood—it wasn't exactly the height,—it was higher after, but after, everything was gone from my place, that granary just went out, and there were three No. 10 wires still attached to the clothes-line post, and I was in hopes to get to them and the wire and lay some protection from tree to tree and get my family where there was an easier tree to climb than the one in the immediate vicinity of the ash pile. I did not succeed in doing that; I got about half ways and I was taken off my feet and swept down the creek I should judge six feet, when I grabbed the first thing that I could get at, and it [307] happened to be an old branch of a tree and just a tiny twig, and I pulled myself to the trunk and I climbed that tree and I absolutely could do nothing then, I stayed up in the tree I should judge from half past 6:00 until half past 12:00—Noon.

Q. Were you in your underwear all that time?

A. Yes, sir.

Mr. COLTON: Move to strike out the last question and answer.

The COURT: I don't remember that he had any opportunity to return to the house.

The family all this time were on the ashes pile, and I was helpless; I couldn't do a thing. I had to rescue them—try to get them to this place; I was just about played out then. As to whether any articles came downstream and rested against this ash pile there that the family climbed up

(Testimony of John B. Brophy.)

ento, will state that the last thing that left my yard was a four-horse seed drill, I was sowing flax a while before, and it came through gentle and below, there was a plum thicket and it banked up and it detained the water quite a lot, but out in the main channel I should judge it run seven miles an hour. There was no comparison whatever between this storm of June 6 and 7, 1929, and with any high water that I had ever seen at my place before.

Cross Examination:

(By Mr. Colton).

Q. Mr. Brophy, you made a statement that the water was only seven miles an hour in the creek?

A. Yes, sir, I take this from observation; approximately seven miles an hour or more. That was right in the creek—in the channel. Any objects—and I seen lots of them going by—you would have to run to keep up with them.

I have lived in the Beaver Creek valley for quite a number of years. In 1885 I was East, going to school. I was in the Beaver Creek valley in 1883. During that time there were a few hail storms that I witnessed. I remember one that struck about [308] five miles south of Wibaux. That was a very bad one. It was a hailstorm and there was lots of water, and it didn't last very long; and one, the widest that crossed Beaver Valley, come from the west and crossed to the east, it didn't last very long, and it raised the water in the creek bank-



(Testimony of John B. Brophy.)

full. In fact, it come so sudden the creek run backwards for a ways and everything clogged up with hail and it looked like everything clogged where the water washed it, and a few times the narrower ones; they were the more vicious.

I worked for the Northern Pacific Railway Company, the defendant in this case, in the summer of 1888. I was doing general work mostly, that year; there was nothing else to do. It was a hard winter, 1886 and -87; it cleaned up the stock in the country. I have done some work close to the Northern Pacific bridge there, as it goes through Wibaux. I was responsible for the bridge and keeping it in repair; keeping it in repair was part of my duty. During the time I worked for them, as to whether or not any damage was done to the piers or piling of the bridge, will state that in 1889 the creek wasn't over two feet above normal and it had to come up. A huge chunk of ice would get up close and hit an object and it would stop it still—just like a locomotive of the Northern Pacific hit it—it was an awful weight. When it struck the piling of the pile bridge, it knocked out two piles of the bridge, that was at different—two different places—and knocked out the southernmost one of the stringer piles.

At the place where I live, I naturally have had considerable trouble with high water down there. Along the east bank of the creek opposite my house, I built a dyke,—nothing like the Mississippi River

(Testimony of John B. Brophy.)

dyke—it was about four feet or three and a half feet high. I built that dyke, or started it at least, about eight years ago. The purpose in my placing it there was to keep the water from running in my yard. It had been there just twice [309] while I lived there, before, and it done no damage to speak of; and I built it to keep it out.

Q. Of course, from your past experience in years that you lived there and your trouble, you were naturally watching the creek on the morning of June 7, 1929?

A. Well, the jury, they can observe that they can go to bed and have it off your mind when you have something that you know you are safe. Naturally, you can't sleep very sound if——

Q. And, of course, the water got very high, flowing into your yard? You knew that from past experience?

A. Twice; yes.

Q. On those occasions you had to move to higher ground? Did you go to the schoolhouse?

A. To the schoolhouse and to a neighbor's house that was handy. The water receded and we went back.

Q. Have you ever made any measurements in the past, and if so, when,—in its fall,—I mean rainfall?

A. Well, in 1921, a storm kind of worked in from the southeast. It was an awful dry year; there was no rain up until the 21st of June. A few broken

(Testimony of John B. Brophy.)

clouds started to travel west and it started to rain in very large drops, and my family says,—I was ready to go to work; I was doing some summer-fallowing out in the field—and my wife says: “It is no use; it is going to rain.” I disputed her, I says: “It doesn’t ‘know how’ to rain this dry year,” and about 15 minutes it just come down—it rained between eight and nine inches in—I should judge the real heavy part of the storm didn’t last over  $\frac{3}{4}$ ths of an hour. So it rained eight or nine inches at my place in about  $\frac{3}{4}$ ths of an hour. The way I measured it, there were several cream cans sitting out there on the table, and there was no wind with this whatsoever, and I would judge from that.

Due west of my place is what I would call a dune. Opposite my place, right straight west, the width of the creek is 200 feet from bank to bank. As to the tributaries that enter Beaver Creek between my house and Wibaux, east and west, both directions, there [310] are two on the east and on the west there are three, I think.

It stopped raining at my place on the morning of June 7, 1929, at half past 4:00. I can’t tell how deep the water got in my house on the morning of the flood. That question can be answered perhaps by my brother. It didn’t wash my house away.

#### Redirect Examination:

There is a bridge north of my place; it is right on my place. It is northeast of my house. There is a high hill or bank immediately to the south of the



(Testimony of John B. Brophy.)

bridge. As to whether the stream flows directly in a straight line to the bridge or whether it winds around this high bank, will state that after leaving the house, it flows easterly direction about a quarter of a mile and then turns back again to the northwest—makes a turn. In my estimation, not one-fourth of the water was flowing under the bridge, because there was so much trash coming down with the water that on every bend of the creek it would pile straw and all kinds of straw and Russian thistles, and so forth,—brush, and also diverted the water out of the channel, and instead of following the course of the old channel it took straight to the north; it went right straight north of my house.

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FRANK MIESOLOSKI,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is Frank Miesoloski. I live 10 miles south of Wibaux. In June, 1929, I was living at home on section 30—13—60. That is just right close to the Beaver Creek, about 200 or 250 feet from creek. I moved there in 1922. My business is farming and ranching. I was at home on the night of June 6th and morning of June 7, 1929. We had high water and storm out my way. That was 1929, 6th

(Testimony of Frank Miesoloski.)

of June, between 5:00 and 6:00, heavy cloud [311] comes and quick—just simply come pretty fast and start rain. At beginning, wasn't so heavy rain, but towards last just like "upset the bucket". On level ground lots of water, about one foot of water. I said it was "just like somebody upset a bucket." When that heavy rain started in it wasn't so heavy, probably one hour or little better than one hour, but wasn't so heavy at beginning; this heavy rain probably only ten minutes last. After that rain, the first thing I went for cows. The cows was the other side of the creek, and there was water running down pretty fast, every place, and I tried to get the cows and it was a quarter of a mile to cows, the creek was raising so fast; when I come back with the cows I couldn't cross "him". When I went in and come back, it was between six and seven foot. The water raised six or seven foot when I went a quarter of a mile and back again. I suppose it took me half an hour, because it was muddy, to go and get my cows and come back again; it was slow walking. There was places water run down over a foot. It was right after 6:00 o'clock that this rise of six to seven feet of water took place,—right after 6:00, after rain,—between 6:00 and 7:00 at night; that is the 6th of June I am talking; this is all on the 6th, and I was trying to get the cows and I couldn't cross them; I got three home, and the others I couldn't make, because planks and trash and stuff started

(Testimony of Frank Miesoloski.)

*started* come in from bridges, so I got three home and the others I left other side, and I went get the three cows and I milk them and I do all the chores, and probably half past 8:00 or 9:00, the creek was about one foot from the top of the bank. I didn't go to bed right away; probably half past 9:00 I went to bed, but I went twice to see what was going on—to see the creek. Before I went to bed, I made two trips down to look at the creek, and all I could see was planks floating in the creek from bridges, and the last I went I didn't notice that it raised any more—just about [312] even—just about even with the creek bank when I went to bed, and when I went to bed it was something after 10:00, something like that; and at 2:00 o'clock in the morning, on the 7th of June, there was heavy lightning striking and shook house, and I look up, and I had big granary there, about 50 or 60 feet from the house towards creek; it was about two feet lower than the house; the water already swept that out. This granary was being swept away when I looked out at 2:00 o'clock; I could see that with the flash of the lightning. In the granary there was ground feed, probably 300 bushel ground feed, wheat, oats, barley—about 300 bushels of various kinds of grain. This granary I think was 12 by 16. I found out later where it went to; it didn't went far; it just hook in trees about a quarter of a mile and just hook in trees other side of creek, and



(Testimony of Frank Miesoloski.)

hook in big trees and it didn't go any farther; the trees stopped it.

I said at 2:00 o'clock I got up and there was this lightning, and I could see the granary going down, and then—the house was kind of weak—I took my family and went to barn. By “weak”, I mean pretty old house. So, barn very good shape; I built that in 1922. So, I took family and went to the barn. I figured that is what saved us. Then we stayed until good daylight, I should judge 4:00 or 4:20, I should judge sun, or sun-up, and the water went down. It was about 2:00 o'clock when we went to the barn; when we come out from house it was just 2:00 o'clock; I looked at the time, at the clock. There was about a foot and a half of water around the house and barn in the yard when we went to the barn. I could not see how wide it was. The yard near my house was just about 16 feet above the bottom of the creek.

Q. And on top of that there was a foot and a half of water?

A. The first one? Well, when we went to the barn, that much, and it raised some more. When we went to the barn, there was a foot and a half on the yard around the house, and that was 16 feet [313] above the creek bottom; when I went to the barn, took my family. After that, it was dark, I couldn't see; all the corrals and woven wire was washed out—woven wire fence out, but not barb wire—first the fences, but no barb wire; all the

(Testimony of Frank Miesoloski.)

woven wire was wiped out, I mean the woven-wire fences on my farm were wiped out. We stayed there in the barn until about good daylight; it was about 4:00 o'clock and the water went down, and I went home to start fire. The family didn't go with me; they stayed in barn. The water had gone down about three feet, from up-to-down. That is just about how it went down. Well, I got to the house; of course, the yard was dry at that time; I mean the one and a half foot of water was gone; and I start fire at the home and I was going to get breakfast, and "here come somebody like a racket"! and it started rising, and I looked out the window and wave come from Ralph Wicke's like ocean wave, and when I looked out at that window—when I looked to Ralph Wicke's place, I should judge 20 or 30 rods his granary already the water carried; that is Wicke's granary. So I grabbed some bread and milk and "beat it" to family—to the barn, and when I step out there was probably one foot of water—maybe not quite foot—something like that, and by the time I get to the barn, it was up to my crotch already. It was about 90 feet from the house to the barn, but when I went to barn I judge it was about 80 feet, because I got in corral—I crawled in corral, and from corral I went in top of roof; that was a short-cut; then I knocked hole down in roof and went in and give the family bread and come out and just at that time, there was cattle wiped out from the corral—those three cows

(Testimony of Frank Miesoloski.)

and there was two went with the stream out half a mile or little better was saved, and the other one went—Ralph Wicke's blacksmith shop went, come hit her and she was drowned.

This that I called an ocean wave of water that I saw come rolling across there, was coming from the southwest; that is the [314] way they come—from Ralph Wicke's straight to me; that big wave was coming from Ralph Wicke's place; the first water came from St. Phillips Creek; they call it St. Phillips Creek—no town, but a postoffice there. This first water came from the direction of St. Phillips. St. Phillips, from my place, is about a quarter mile southeast. Wicke's place is southwest from my place and this is southeast. The first rush of water, I said, came from the direction of St. Phillips. It is a pretty long creek there—this water coming down from St. Phillips; it is water standing here and there around in places. That is all I know, they call the creek St. Phillips, and there was lots of dry creeks running into that—into St. Phillips Creek. This ocean wave that I speak of, didn't come from St. Phillips; it come from Wicke's,—it came from the southwest and was moving northeast. I didn't know at first how wide that so-called ocean wave was; it was pretty wide, but when I come into the barn and I looked out, it was just about  $\frac{3}{4}$ ths of a mile,—this ocean wave was  $\frac{3}{4}$ ths of a mile wide when I observed it from the barn. As to how high: well, really, it looked higher to this—



(Testimony of Frank Miesoloski.)

I was figuring between  $2\frac{1}{2}$  or maybe 3 feet, and it come from Wicke's—maybe 4 feet, I could not say—I couldn't tell,—but the highest it come was 4 feet. Before this  $\frac{3}{4}$ -of-a-mile wave of water came through there, before that wave came, the width of this water was about 400 or 500 feet. You see, from the house it is lower there from the east; it was about 400 feet. You see, the creek itself was probably 75 feet, or maybe 65 feet, but there was a low place—between something like that, 400 or 500 feet. As to where this width of 500 feet of water, before the wave came,—where the 500 feet ran from and where it ran to,—that mostly run to the general creek—kind of go around—it follow the creek; it followed the creek. This wave of water I speak of moved awful fast. When I come out from barn and when it come against the fences—all the fences they are [315] built east and west—they just went like one shot; they just took right off. The other fences wasn't so bad off that way or ruined with water; they were just damaged and one thing or another; and all the fences go east and west they just wipe right off. This water that was there before the wave came it was running fast speed. Before the wave came, this water was running anyway seven or eight miles an hour, the very least. As to whether that water was making the turns and twists that the creek ordinarily does, before that wave came, will say that where it was high bank, it follow the creek; where low places, three or four feet lower,

(Testimony of Frank Miesoloski.)

it run across—that is the way it was. There was a difference in them banks,—16 feet in places, and 10 feet, you see lower. Well, where it was lower, it was going right across. Some places the water stayed in the creek because the banks were higher than other places, and other places where they were lower, it got out and went across. About the wave of water that came in there, as to what the water did then—whether it followed the course of the creek then—will say that it went right straight.

Q. What do you mean by “right straight”?

A. Through the field.

Q. Through the fields?

A. Through the field.

I am not still living at the same place; I move out. Before this 1929 flood, during the years that I had lived there, I had never seen anything like this before there. I moved about 70 feet on the bench. I built a new house, and barn and moved everything up on the high place.

There is a grove, or a stand of trees,—big bunch—west of my place and north. I have a suspension bridge there across the creek. Down near that suspension bridge there is a grove of trees.

Q. About how far are the trees from where your house and barn were in June, 1929?

A. You mean, where is that bridge?

Q. Yes.

A. I should judge about from 10 to 20 rods, start in around. The trees are mostly on the west

(Testimony of Frank Miesoloski.)

side of the creek; it [316] is on both sides. As to how high that ground is where the trees are, above the bottom of the creek, probably 10 or 12 feet and the other side about 16 or 18 feet. During the flood of June 6 and 7, 1929, there was some of it the fence hooked onto and pulled out—some of it the wire fence came against and just pulled right out by the roots. They were live trees, you bet. Those trees were mostly box elder and ash. Those trees were pretty big—probably two or three feet around, some of them. But those that were pulled out were pretty big trees.

After the flood, I found high-water marks in the trees.

Q. Tell us about those high-water marks—how high the water got in the trees and how high the trees were at that place above the bottom of the creek. You say you had trees some places 12 and 18 and 20 feet above the creek. Now, if you give us high-water marks on trees, I want to know which trees you are telling about.

A. Where there was 16-foot banks, it was probably 3½ or 4 feet of water, but where it was lower it was up to 9 feet on them trees, Where I say it was lower and the water got 9 feet up in the trees, the trees in that place were probably 8 feet above the bottom of the creek. So the water would be 8 plus 9, or 17 feet just about. That is my judgment, because the trees are not the same—places lower and places higher. I didn't measure it, but on that



(Testimony of Frank Miesoloski.)

suspension bridge, my poles stick out about 9 feet, and it just covered those poles.

I told you a little while ago about making this fire in the stove and that I heard a roar or noise like a car coming. That wasn't an automobile coming; that was water coming against the house and rubbishes, and it was kind of foaming; and there was chicken coops, you see it come from St. Phillips, and there was a bunch of pigs coming and hog-house and all them, and when one of them hit my corral, it just went in about 50 pieces. They come clear through to hit my one corral. That is the reason it smash [317] my corral; and that was about 10 minutes before the wave came.

Cross Examination:

(By Mr. Maury).

I was at Baker two and a half years ago at a trial there. At that trial, every night, I would be in the old theatre building there talking over my testimony with claim agents and attorneys. Then I came back to Baker as a witness in a similar case last September.

Q. And every night you would talk over your testimony with claim agents and——

A. No, no.

Q. You didn't talk it over then?

A. No.

Q. Your story, when you first told it at the first trial, took about four minutes to tell?

A. I don't know how long it take.

(Testimony of Frank Miesoloski.)

Q. Would you say that that (showing papers to witness) looks like your story at the first trial?

A. It is the same what I am telling now, isn't it?

Q. Yes, that is part of the same.

A. That is the same thing. Maybe one thing just about the other—very little difference. But this is the story at the first trial.

All the water I saw there stayed in the channel where the banks were higher and got out where the banks were low.

Q. Frank, the water was highest about 11:00 o'clock on the morning of June 7th 1929, wasn't it?

A. That is June 6th?

Q. No, on June 7th 1929 (showing papers to witness), the water was highest about 11:00 o'clock?

A. No, no.

Q. The morning of June 7th 1929?

A. It was, I should judge, about 6:00. I don't know, because I didn't have time.

Mr. MAURY: Have you got the record on him there? Where is that Mr. Colton?

Q. (Showing Transcript on Appeal, *M. C. Heckaman vs. Northern Pacific Railway Company*, page 759) Were you asked this question at a trial at Baker two and a half years ago? [318]

Mr. McCARTHY: I suggest you allow him to read it.

Mr. MAURY: Well, if he can read it.

A. I can English and Polish too.

(Testimony of Frank Miesoloski.)

I don't know whether I was asked that question at that trial two and a half years ago; I don't remember; I think you did.

Mr. McCARTHY: Let him read it first Mr. Maury.

Mr. MAURY: He has plenty of time to read it.

Q. "I tell you it is hard to tell, 11:00 o'clock, but I figure from sun-up, it started to make the second raise." Now, did you make that answer Frank?

A. Yes.

Q. And you went on further: "I suppose it was about half an hour; by that time took the machinery; then it raised another foot slow—another foot maybe slow, maybe hour, maybe half hour." Was that your answer?

A. Yes.

Q. At that trial?

A. Yes, water working just up and down after that wave come, it going up and down (indicating); it went down probably 6 or 10 inches, and then up again.

Mr. COLTON: Up slowly?

A. Yes, up slow, up and down.

I am 10 miles from Wibaux. I have seen a man crossing one of those streams on horseback when they were high, taking a horse across, I crossed myself.

Q. Yes, and when you get right above the old channel, the water goes fast doesn't it?



(Testimony of Frank Miesoloski.)

A. Well, the top goes faster and the bottom goes slow. The top goes fast right when you get to the channel. I have swam horses across Beaver Creek when it is high.

Q. You get on the horse and you start in and when you get to the channel, where the channel was you know—before there was any high water—then the water would speed up as you get your horse in? You would be washed downstream a ways, wouldn't you?

A. Yes, sir.

Q. And when you got over the part that was the channel and over water that was over the banks, then it would slow up again? [319]

A. Yes, the edge of the banks not go quite so fast—not so fast close to the bank.

I think maybe I didn't tell you about those trees before at any of these trials; I don't think maybe you asked me, because they are still laying there; anybody can come see; it is there.

This picture looks like some of the hills—I seen hills like that—but I don't know if they are close to my place; I didn't see any like that close to Beaver Creek; I did in the badlands,—I am not in the badlands. Beaver Creek runs in the badlands maybe some places. I am maybe two miles from Duck Creek; Duck Creek flows into Beaver about 2½ miles from my house, that is not south, that is—I suppose that some of this water came up Duck Creek that morning. That doesn't look like

(Testimony of Frank Miesoloski.)

the Duck Creek country; I haven't seen anything like that there (referring to pictures shown to witness).

St. Phillips is a settlement of Polish folks, Russian folks, it is mixed Irish, Dutchmans and Polish and—— I have lived at my present place since 1922; I come into this country in 1909; I moved to that place where the water came down, in 1922.

Q. How often have you tried to swim across Beaver Creek when it was high—out of its banks?

A. I did not swim, but I rode the horse so I get across, seven times—oh, I don't know how many times. I never swim. Where they go across the creek the fences wash out just about every year, but that is just where they cross the creek, main channel, see?

Redirect Examination:

I said that the fences that would go across the main channel of the creek frequently washed out. These fences that washed out in the June, 1929, flood was located on top—top of banks, fields, pasture. I never did have those fences on the top of the bank washed out before.

Whether I recognize any of these pictures, will say that [320] (pointing) is where it used to be my house—right here, and here was it on the top of the divide.

Mr. McCARTHY: Defendant's exhibit D-14 is offered in evidence. I will take the notes off.

(Testimony of Frank Miesoloski.)

Mr. MAURY: Yes, remove the legend. No objection.

The COURT: Very well; it may be received.

Q. The white house shown there in the picture, what is that?

A. That is my house,—no. My old house doesn't show; there is pieces. That is where the house was, right here; and here it was posts left, these posts show, that is right near bridge. There was water up to here, over that; you see that is the foot bridge—suspension bridge. (Counsel using magnifying glass). I spoke of a place, a post where the water was up over, that is right here; that is counting from right to left, the second post.

Q. Now, you speak of the suspension bridge. Will you use the glass?

A. I can see it very well; it is right there, see it?

Mr. MAURY: I would suggest that the witness in testifying about those photographs saying "Here and here", that he get down in front of the jury.

Mr. McCARTHY: I am trying to get them located Mr. Maury.

I see the third post from right to left, then there is a little short post—that would be the fourth post. Now then, the suspension bridge is about half way between the third post and the short post, that is the one that was broken off,—between those trees. Where the suspension bridge was, as to the height of the banks of the creek, one side was



(Testimony of Frank Miesoloski.)

about 18 feet and the other side about 8. That is low, you see,—about 8, more or less.

Q. What is the level ground where post No. 3, right to the left as compared to the banks, of the suspension bridge?

A. I suppose four feet lower at this end.

Q. You think the ground is lower where the post was?

A. Higher. You see, that just about come even with the—— The ground where [321] the third post is I think was about 16 feet above the bottom of the creek. The height of the post I think, above the ground, was about 5 feet. As to where the water was with reference to that post, this here post stick out about three inches, and this one stick out more; I didn't measure it. The second post, right to left, stuck out of the water about three inches; the height of that post above the ground, is about  $4\frac{1}{2}$  feet. Where the second post is, the ground is a little lower than where the third post is—a trifle lower.

Q. What we want to get is how high the top of the post No. 2, right to left, was above the bottom of the creek?

A. I should judge ten inches or——

Q. No; you said the ground here where post No. 3 is, was 16 feet above the bottom of the creek?

A. Yes. As to the height above the bottom of the creek where post No. 2 is, it is probably  $15\frac{1}{2}$  feet. Post No. 2, counting right to left, is about  $4\frac{1}{2}$  feet

(Testimony of Frank Miesoloski.)

high. So, if the water got up on post No. 2 and about three inches stuck out, we would have between 19 and 20 feet of water there.

These (counsel showing other pictuers to witness), are not pictures at my place.

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JOHN EFTA,

called for further cross examination, by Mr. Maury:

I didn't speak yesterday of a cow stable—a barn of some kind—that the water got into—Barn or stable? Which barn or stable?

Q. That you were in and that water got into?

A. I didn't speak of to yesterday. I was the man that testified yesterday, that was at Robert Wicke's; I was there, sure. The water got into the barn or house over there; sure, the water got into all the buildings over there. It was a round barn, silo inside, made out of [322] wood. I should judge the walls was six feet high. The walls were made out of drop-siding; it is regular drop-siding, that is the only way I could describe it; that is the only name; it wasn't made out of planks, it is a regular drop-siding. Drop-siding is six-inch boards and it has got a drop and it has got a groove underneath and it is matched together.

Q. Thin boards?

A. Why don't you listen when I explain? It is drop-siding, got groove, matched underneath under

(Testimony of John Efta.)

the board, and on the top is a groove and cut off, and the boards are matched together to hold the water and the weather.

That wall of water struck that building. It didn't move it any. As to how fast that wall of water was going, I told you yesterday "just as fast as I could jump in the barn". That is pretty hard to tell how many miles an hour it was going. I saw it before it got there; it was 200 feet away, and I just got time to jump in the barn and it was right in the barn.

Q. Oh, it must have been going at least 15 or 20 miles an hour, wasn't it, John?

A. I haven't got no idea at all, how long——

Q. How long it would take that water to come that 200 feet?

A. Yes, sir.

Q. Not over two seconds, was it?

A. I never did time it, how fast I could jump. The barn was not moved off the foundation by that wall of water.

By Mr. McCarthy:

Other buildings there were moved. The house was moved about 15 feet and the granary was moved entirely from the foundation.



W. E. PIERCE,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. Hall).

My name is W. E. Pierce. I live at Butte, Montana. I am [323] district manager for Dun & Bradstreet, Incorporated, formerly R. G. Dun & Company. I have my office in Butte. We have in my office the reports that are made by business houses and merchants in the State of Montana, as to their financial responsibility and assets. I now have with me the reports of the financial standing of Nick Wagner for the years 1928 and 1929. As to the manner of obtaining these reports, we get them in two ways. Immediately after the first of the year, we send blanks to the merchants all over our district, requesting a statement by mail, and we follow that up later in the year with a traveling reporter who calls on those merchants who had not made statements and he requests statements personally.

Q. When the traveling reporter calls, what is the source of information that he relies on——

Mr. MAURY: Objected to as calling for a conclusion. It is impossible for this witness to answer what some traveling reporter relies on.

The COURT: You can show what his instructions are to this reporter.

(Testimony of W. E. Pierce.)

The men are instructed to go directly to the merchant himself and request a statement. The merchant is always asked for a copy of his statement from inventory, and if he hasn't an inventory, then they ask for an estimated statement as close as he can give it. I have those two reports here; I did not take these personally. The man that took those is an employee of our Omaha, Nebraska, office. These statements are signed by Nick Wagner. I, of course, of my own knowledge, do not know whether that is his signature.

Mr. MAURY: Let's see them Mr. Hall. This is for the year 1928?

Mr. HALL: Yes.

Mr. MAURY: Introduce them in evidence. I will look [324] over this one.

Mr. HALL: The question is, will you admit that that is Nick Wagner's signature?

Mr. MAURY: Oh, yes, this is Nick Wagner's signature. I know his signature.

Mr. HALL: We can introduce these with the understanding copies can be substituted later on.

Defendant's exhibit D-15, one of the papers I handed you, was taken September 29th 1928.

(Mr. Hall reading exhibit D-15 to the jury).

Defendant's exhibit D-16 was taken October 5, 1929.

(Mr. Hall reading exhibit D-16 to the jury).

Mr. HALL: We offer both of these in evidence, defendant's exhibits D-15 and D-16.

Mr. MAURY: No objection.

(Testimony of W. E. Pierce.)

Cross Examination:

(By Mr. Maury).

I have never been in Nick Wagner's store in Wibaux myself. I have never seen Nick Wagner before seeing him in court here. The young man that visited him and wrote this statement is still with my company. His name is A. C. Larson. I knew his address for the last six months; I knew how to get him. If counsel had asked me, I could have given him his address down there. They could have taken his deposition any time in the last six months. As to the dates that are meant by those figures on those reports, "10/5/29", that means October 5th 1929. Our young man doubtless put that there as the date that he visited Nick Wagner's store. And this is "9/29/28", that is doubtless September 29th 1928. That showed Nick Wagner's net worth on September 29th, 1928, to be \$28,000.00; and our folks are very careful in considering those things, and particularly, we don't want to overrate a merchant because wholesalers extend credit largely on the [325] strength of our rating, and we don't take the merchant's word for it unless it looks reasonable. Our young men are instructed to look over stocks; they have experience in looking over stocks, and to a certain extent, they get a certain experience and skill in determining what a man is worth and we can tell after a while whether a man is giving us any "guff" or not.



(Testimony of W. E. Pierce.)

Q. And Nick Wagner, probably as close as any mercantile agent and probably as close as he himself, can tell, was in October, 1928, worth \$28,000.00?

A. Well, that was his own opinion, Mr. Maury.

Q. And your young man doubtless found nothing to dispute that?

A. I wouldn't say that. Any well-informed credit man knows that from an estimated statement, it is the human tendency to give himself a little bit the best of it.

Q. Yes, we know that. Yet, he was according to that statement, classed as an honorable, high-class merchant,—statement? Wasn't he?

A. Well, I wouldn't say that; I don't know a thing about it. He owed for his merchandise \$1,297.00. According to his own statement, there was not a dollar overdue. That is his statement,—that he didn't owe anything for merchandise, past due; he had no trade acceptances out; no loans from the bank; no loans from others; and no chattel mortgages; and he didn't owe anything on the purchase price.

Redirect Examination:

Mr. Maury refers to his net assets as \$28,000.00. Of course, that net worth includes his real estate. His merchandise was listed by him there as \$15,000.00, and in the other one his merchandise was listed at \$12,000.00; and in the second statement, he didn't list his store building and lots, as in the first one, at \$5,000.00. I stated that where a man

(Testimony of W. E. Pierce.)

makes an estimate and so forth, that we try to check up, in addition to him,—at the bank—what he owes at the bank, and so forth. As you understand, what we get from him is as reliable a report as we can [326] from him, to furnish to the wholesalers in order to extend credit, and so forth.

#### Recross Examination:

I don't know how much goods he bought between the October report of 1928, and June 7, 1929. We apparently have no record of how heavily he "loaded up" in the spring of 1929. He didn't request us for a credit rating; he could possibly buy merchandise on his own standing.

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#### JOE BURKE,

being first duly sworn as a witness in behalf of the defendant, testified:

#### Direct Examination:

(By Mr. McCarthy).

My name is Joe Burke. I live on section 24—14—59, two miles south of Wibaux. I lived on that place since the fall of 1928, and half a mile north from there since the fall of 1924; have lived in the Beaver Valley there since 1924, or I have lived in other parts of the Beaver Valley before that; since the spring of 1911, I have lived lower down in the Beaver Valley. But I have been at my pres-

(Testimony of Joe Burke.)

ent place of residence since 1924. I am living at the same place I was living in 1924 and in June, 1929.

I was at home the night of June 6th and the morning of June 7th 1929. We had a storm around our place, and flood. In the evening, June 6th, I went to bed early, and I don't know what went on in the night—I was a pretty hard sleeper—but along early in the morning I was woke up by a 'phone call along about 4:00 o'clock and they asked me if I knew anything about high water, and I says, "No". They says: "Then you better look around and vacate," and I looked around and I seen the water was getting high, so I dressed and woke up my nephew that was with me—a young boy then—and I says, "Let's go down to the barn." I have a basement-barn which is right on the creek bank, and we got [327] down there and there were six calves tied up in there at the far end, and to go down into it I have a flight of stairs which is about one rod long, and the water was just about up to the barn on the lower side, and I looked up the creek and I seen a big roll of water coming down. I should judge that this roll of water I saw was about four feet high. I couldn't say how wide it was because I didn't take much time to examine it. As to what attracted my attention to this roll of water, I called it,—I looked up the creek to see how much time I would have to work. I knew this roll was coming by the noise—kind of a roar-



(Testimony of Joe Burke.)

ing noise—it was kind of rumbling like. Well, I heard this rumbling and I saw this roll of water four feet high, coming down, then I told Earl, my nephew, I says, “You untie the calves and I will carry them up,” so he took his knife and cut the rope and I started carrying them out. The calves were from a month to maybe two or three months old. I had to carry them up them stairs, about a rod high. The height from the floor of the calf-barn to where I was taking them up was I should judge about seven feet. I started carrying them out and, of course, when I started, I was fresh and I could go about half ways up the stairs and throw them out of the door and let them go, but after I carried out a couple, they kept getting heavier and heavier and by the time I got to the last one, I had water pretty near up to my arm (indicating armpit). Before I started, the barn was dry. It was about two feet away,—up to the door—when I started to carry them. I got the calves all out, then I says to Earl (we looked out and the cows had worked up north on lower ground and I see where that was all going to fill up) and I says, “We better get the cows.” Well, before leaving the site of the calf-barn, ordinarily, from my calf-barn over to low-water in the creek it is about 100 feet. The height of the bank of the creek where the stream is,—well, it gradually works up towards the barn, but I should judge maybe [328] six feet, something like that. The height of the

(Testimony of Joe Burke.)

floor of my calf-barn above the bottom of the creek is about 12 feet—about 12 feet above the level of the creek. As you understand, the ground slopes down from my calf-barn down to the creek. The floor of the calf barn is about 12 feet above the level of the water—about 12 feet above the level of the creek-water in low-water time, and the calf barn on the ground above it, was seven feet. So, I think (I never have measured it, it is just my estimation) that the ground at the top of the calf barn would be about 19 feet above the low-water level of the creek—of the water in the creek.

After I got these calves up on this ground 19 feet approximately, above the low-water level of the creek, my nephew and I went north of the house with reference to the cattle that I spoke of; that is where my cows were; this cow barn is east and a little south from the house and the horse barn is north from the house, just the opposite direction from the house—north; the horse barn is northwest from the cow barn. The cows had went down below the horse barn; that would be still further north than my horse barn was, that is from my house. With reference to being in line,—how they are located—the cow barn is east and a little south,—east about 200 feet; if I ran a line from the calf barn to my house and then another line to my horse barn, and another line from the horse barn to the cowbarn, I would have a triangle there; if I went right north from the cow barn, I would



(Testimony of Joe Burke.)

head right in the creek. The elevation of the ground that my house rests on is about a foot higher than the elevation of the top of the ground at the cow barn. The land down around the horse barn where the cattle were is lower—quite a bit lower. After I got my calves out there, we started to get the cows to bring them back to the granary, which is the highest ground there, and there was no water where the cows were at when we went out, or [329] where we crossed to get them. That is, from this level that the top of the cow barn was, there was no water where the cows was and no water where the horse barn was. We got down to the cattle. It was dry all that time. We just got the cattle started and got back to the horse barn when another roll come up—another roll of water. As to how high that roll of water was,—well, about two and a half feet of water where the horse barn was. I couldn't say how wide that roll of water was because when that roll come over, then it spread a good bit in the field there on the west side,—kind of a flat. The water went across the field I should judge, 40 or 50 rods. Well, we got down there and this roll came along, then most of the cows went into the horse barn and we had to plug them out of there, then they went up by the granary, but we—my nephew and I—got marooned and couldn't get back. We were marooned right west from the horse barn and there was deeper water between us and the house and there was such a current that we couldn't get back. That



(Testimony of Joe Burke.)

current was fast—running water,—very fast. It was running fast enough that it washed the boy down and he grabbed ahold of a post this way and the stream was hard enough that he couldn't hold his feet on the ground. The boy was around 14 years old at the time. He was not so awful big, kind of thin, and not awful heavy. He got ahold of this fence post and the water carried his feet downstream. Then he stayed there, and I was still in the water just a little better than knee-deep and it was all I could do to hold myself up from being washed down, because the current took my feet away from under me, so I had to walk just stiff-legged and hold my bearings. That water was going west; the creek was cutting across then and it was going west from our horse barn. The water was cutting across out of the banks, creek banks, and cutting across making a straight channel.

I recognize defendant's exhibits Q and R. Defendant's Q is a picture of my cow barn and granary and some machinery. That [330] picture was taken from the north; the camera was facing south. The cow barn is below that hay stack. The large building is the granary,—this (indicating). Defendant's R is a picture of the cow barn that I took them calves out of. The man standing there is myself, the boy is my son. That is not the boy I referred to as having been in the water.

Mr. McCARTHY: Is Earl Sawyer here? (Young man stood up). Is this the nephew you spoke of?

(Testimony of Joe Burke.)

A. Yes, sir.

The cow barn door, where I am standing there, that is the bottom door where the water was to when we went down. This is the closest door to the creek.

The COURT: It would be much more informative if you would stand up to the jury there and show them——

Mr. McCARTHY: I now offer them (Q and R) in evidence.

Mr. MAURY: No objection; tear the legend off.

The camera was facing south when this top picture Q was taken. This building to which you are pointing on the extreme right of the exhibit is the granary. The cow barn that I have been talking about, that the calves were in, is right below that hay stack. The house was in further this way, north and west from the granary; that would be right in here (indicating) on the picture. Defendant's R is a picture of the cow barn that I took them calves out of; the door shown there, that is the door closest to the creek. That door that I took the calves out of would be coming up above there on this side—north side. The stair is right about here and it leads right straight out on higher ground above the barn. The door shown in the picture is on the east side of the cow barn; the door out of which I took the calves is located on the west side of the barn.

Some machinery shown in that picture is the machinery that washed away when that second water

(Testimony of Joe Burke.)

come up, that is where the water cut across, it went over that bank and took all that [331] machinery and fences. That machinery consisted of a wagon with a 26-inch box on; sled with a 26-inch box on, and a lot of wood and stuff like that; and water tank, which was full of water, washed out. The wagon and sled—of course, the box left and went further, but the wagon and sled and gears mixed together, didn't go very far—just stayed down in the hole, and I didn't know anything about them, where they was at—until the water went down, and I got them then. The box was washed down about half a mile, and the water tank.

My place is about two and a half miles from Mr. Brophy's; he is south from me. I know where Mr. Massey lives; he lives north from me; he lives nearly two miles north from my place.

Cross Examination:

(By Mr. Colton).

That first roll of water about which I just testified, came I should judge, 15 to 20 minutes after 4:00, or half-past.

Q. That roll of water didn't come up to the cow barn when you and the boy were after the calves?

A. It got into the cowbarn but——

Q. It got into the horse barn?

A. Yes, sir.

The cows weren't in the barn.



(Testimony of Joe Burke.)

Q. I want you to describe the position of the barn where you and the boy brought the calves from, in connection with the banks of the creek?

A. Well, they were right west from the creek.

Q. How was the barn built? Get at it that way.

A. 14——

Q. What did the west wall consist of?

A. The barn——

Q. Where the calves were, what did it consist of? Answer it. (No ans)

Q. Isn't it a fact the barn where the calves were was built right down under the bank of the creek?

A. No, it isn't; the calves were in that barn.

Q. I have asked you twice about the barn where the calves were?

A. The cows——

Q. I am not talking about cows. [332]

The COURT: He doesn't understand you. He thinks you said cows when you said calves.

Q. I want you to describe how the barn where the calves were the morning of the flood, how that is situated with reference to the west bank of the creek?

A. The creek comes from the east——

Q. I want you to answer——

Mr. HALL: Let him go ahead and explain.

A. The creek comes from the east and when it comes down here, it turns and goes north, and right in here is where my cow barn is—where them

(Testimony of Joe Burke.)

calves were—about 100 feet from the creek. Walking along the Beaver, the high land where my house is situated, and the straw stack in that picture, it is not a fact that you can step up on the top,—the roof of that barn; the roof of that barn is about five feet above the ground; the greater part of the barn is under that bench. When I packed the calves up out of there, I had to pack them up six or seven feet up on the ground where my house sets. Immediately south of that barn there is a sort of a precipice,—a fall southeast,—there is a precipice there. In that picture, plaintiff's exhibit 27 (No. 2438, 9/30-33), is my cow barn.

Q. Any objection to this? Step off of the witness stand and explain to the jury where that barn is situated?

A. This is right in the bend of the creek where it comes here from the east and turns in here and goes back north, and here in the barn off in the bend, right in there. South of the barn down here, this is lower ground in here, and back in here it rises; it is a high rise. I don't call this right here a bench. Then the height of that raise above the level of the ground where the barn is down there, is 10 feet. It is a fact that when I looked south when I went down after those calves, that the water was coming over that bench, but the lower place was also filled. It wasn't over that bench where I saw that water coming; that roll of water [333] was coming down the creek; it was just in

(Testimony of Joe Burke.)

the creek and out a ways. It could get out a ways without going out over the bench, because that bench don't start right at the creek; it starts maybe 15 rods or so back from the creek. I don't know how wide that first roll of water was that was coming down there at 20 past 4:00 that morning. It entered in the cow yard,—not up above. That roll of water was confined within the banks, high banks of the creek at my place; that first roll of water did not come up where the house, horse barn or granary was. I never looked to see how much below the banks of the creek that first roll of water came; I don't know, I didn't see it—what I was watching out for was myself and stock,—I didn't have time; it was confined within the high banks of the creek.

I testified at two or three former trials. I don't know but what I have testified about a second roll of water before,—I wouldn't say but what I have.

Q. I will refresh your recollection of a case two and a half years ago, Heckaman vs. Northern Pacific, a case arising out of the same flood, and ask you to refresh your recollection (pages 782-783, Vol. 2, printed Transcript on Appeal, M. C. Heckaman vs. Northern Pacific Railway Company).

A. This is all right, but that shows you there about the second raise.

Q. I am asking you if you say there was a second roll of water?

A. That shows it.



(Testimony of Joe Burke.)

Q. Then you say there was a second raise, but not a second wall?

A. Well, you could call it that way.

Q. It was a second raise? I will show you this part here.

The COURT: Let him read it to the jury.

“This roll of water that I saw coming, whether it struck the barn, it was while I was taking out the calves. Whilst I was taking out the calves, it come up, you see, pretty near under my arms—I should judge about four feet. The water then continued [334] to rise, I couldn't say for how long, because when they were taken out we vacated. The water washed out about one mile of my fence; it tore up one of my barns; washed out some crop.”

At that trial maybe you didn't ask me about a second roll or raise of water.

Q. You said the water continued to raise, and that is what happened, isn't it? (No ans.)

Q. We never called you as a witness, did we?

A. No, sir.

Q. Now, this place where you got marooned,—between the other barn and the house, that is sort of a low swale?

A. There is sort of a low swale between the house and the barn. The cause of our being marooned there is result of that low swale,—there was no water when we went out, but before we could get back

(Testimony of Joe Burke.)

with the cows, that water was running through the swale between the house and the barn. We was where we couldn't get out. One of the neighbor boys come up with a saddle horse and rescued us—took Earl first and then me. Shortly after he rescued us we vacated. We went to Ed. Parker's from there—went half a mile north and half a mile west. It is on the same valley level as Beaver Creek where we went, about the same bench the house is on. There was no water in my house in 1929. After we were rescued we went out on a saddle horse to Ed. Parker's. As to the depth of the water over the flats, the deepest place south of my garden, was kind of a swale and about belly-deep to a horse, and it was all we could do to get through. The average along the valley level going along there to Parker's, was maybe a foot or a foot and a half of water until we got into that low place. When we got into the swales there was lots of current; around the house there wasn't. As we went up the road there was plenty of current; the deepest was belly-deep to a horse on an average.

As to how long the water stood around the bench there on the morning of June 7, 1929, will state it was gone when I come back. [335] I don't know exactly what time I come back, but if I remember right, it was sometime before noon. The water was mostly all off the flats then, it was back down into the high banks; there was no water up above. My nephew, that held onto the post, was around 14 years old at that time I think.

(Testimony of Joe Burke.)

Redirect Examination:

Q. You spoke of being rescued. Just how was that rescue effected?

A. By a saddle horse. When I looked out and seen Gene Parker coming with a saddle horse, I felt pretty good.

Mr. MAURY: We move to strike out, "I felt pretty good." That is non-sensical.

The COURT: All right.

He came down there on a saddle horse. He was a young man. When I seen him coming, there was a hay stack coming towards me, and I walked up on dry footing and the hay stack stayed there and I stayed on it, and when Gene come, I asked him to get Earl first and then come back and get me, which he did. It was all the horse could do to go through that water. It was a swift current that was bothering the horse. When we left our place and went to the neighbors, we went by horse; you couldn't get by with an automobile. There was water around the vicinity of my house when we left or vacated—not very deep and not very live water. It come fairly close all around the house, within a few feet. By "fairly close" I mean it went in maybe two or three feet maybe, some places, close, and some places a little further. Roughly speaking, the house was surrounded by water and it got within two or three feet of the house. As to the condition of the road the water went quite a ways, from a few inches to belly-deep on a horse, and plenty of current.



(Testimony of Joe Burke.)

Recross Examination:

I don't know whether my house is on the same bench with Mr. Massey's, I couldn't say; I don't know if it is on the same [336] bench as Clem Parker's. I don't know if any water got in Clem Parker's house, I wasn't up there.

I saw this first roll of water coming before I started taking the calves out. It took me approximately 15 minutes to get the calves out; I was working fast. How far the roll of water was away when I started taking the calves out is hard to answer; I should judge 50 rods or some such a matter, I don't know just how far it was. I can guess how wide the banks are at that barn—between high-bank and high-bank; an estimate is between four to six rods between the banks of the creek.

Redirect Examination:

When I speak of the banks being so-many rods across, I refer to the high bank.

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TOM RUSH,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is Tom Rush. I live 18 miles south and west of Wibaux. I formerly lived in close to Wi-

United States  
Circuit Court of Appeals  
For the Ninth Circuit. <sup>2</sup>

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NORTHERN PACIFIC RAILWAY COMPANY,  
a Corporation,

Appellant.

vs.

OLIVIA WAGNER, as Administratrix with the  
Will Annexed of the Estate of Nick Wagner,  
Deceased,

Appellee.

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Transcript of Record

In Two Volumes

VOLUME II

Pages 433 to 880

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Upon Appeal from the District Court of the  
United States for the District of Montana.

FILED  
JUL 25 1935

PAUL F. O'BRIEN,  
Clerk





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Upon Appeal from the District Court of the  
United States for the District of Montana.



(Testimony of Tom Rush.)

baux. I don't think I have looked at this relief map here—this model. Perhaps I wouldn't know much about it if I did look at it. Mr. Massey is living on the place now—the place where I lived when I lived close to Wibaux. I commenced to live there at what you have been calling here the “Massey Ranch”, in 1884, and moved away from there the 24th,—1919—on the 24th, which I think would be about 40 years; roughly speaking, I lived there about 40 years. I am getting a little bit old now; the 10th of June I will be 79. When I lived at what we call now the Massey place, I had a cow barn there—one barn, we used to call it the “dugout”; it was dug in the side of the bank; we used to like to use it for a winter barn in extra cold weather. The “winter cow barn” would [337] be in a southwest course from the house.

Mr. MAURY: Witness pointing in northwest course.

Mr. HALL: Oh, no.

A. I haven't got any barn north—northwest of that house at all.

Q. Now, this is supposed to be the town of Wibaux.

A. Fine looking town,—the railroad track right along there. It is pretty plain now when you explained where the depot, the stockyards, the elevator and the city water tank are. I see the Davis Addition; (I used to cut hay in the early days in the Davis Addition;) and this is supposed to repre-



(Testimony of Tom Rush.)

sent my ranch. That small model looks something like my house. There was all the way from two to three acres in that patch. This white mark over here on the bank of the creek—that don't represent the cow barn does it? Yes, sir, that would be the way the creek would run down by that winter cow barn. (Witness standing so he could look towards the town from house). Is this the house? And this the creek along here?

Q. No, here is the road running here—this brown or burnt sienna is the road; the blue line is the creek. \* \* Now, you are south of the house. The scale of this map, Mr. Rush, is, one inch on the map equals 50 feet, so that when you stand here, you are 1000 feet south from your house; you are 1000 feet approximately between the edge of this map and your house. \* The blue line is the creek. Now, would this white mark here be about the cow barn that you have spoken of, in the bank? —

A. I will have to look at that a while.

Q. Mr. Hall calls my attention that there has been evidence here that the creek used to flow in closer to the bank here.

A. Yes; that barn you speak of; this is the creek; that barn ought to be on this side here; well, it ought to be on the side next to the house; that would be it there. I have had more than one cow barn there—at the same location. I had what we call that underground barn, and I had another one up here on top. [338]

(Testimony of Tom Rush.)

Q. I am speaking of the winter cow barn in the embankment. You never had but one of those Mr. Rush?

A. I had one up on high ground here you know.

Q. Could you give us any idea when you built this winter cow barn up on the bank, and about when you left the place and turned it over to Massey—the one that was there then?

A. I would judge I built that there when I lived there about half of that time.

Q. (You may get up on the stand.) Now, Mr. Rush, during the years when you had been living at what we have been calling here the Massey place, did you have any trouble with high water getting up out of the creek and getting up around that winter cow barn?

A. No, sir, we did not. \* \* Water never got up in that cow barn and water never got up around my house—never. As to whether water ever got between my house and the road that ran in front of my house, east of my house, that ran up to the main road that went to town, will say it was always perfectly dry; there was a two or three-acre patch.

Cross Examination:

(By Mr. Maury):

Q. Mr. Rush, there was a two or three-acre patch there that never was covered with water wasn't there?

A. Well, this little patch up around the house was never covered with water; there never was any

(Testimony of Tom Rush.)

water on there to bother anybody—on that little patch there, you know. The creek ran pretty close to that little patch.

Often I have seen the Beaver Creek rise. In the spring of the year when the ice was going out, it would be natural for the water to raise a little on each side of the creek—that would be about all. It got out of the banks onto the low ground here. I think it was in 1921; it covered that low ground; it wasn't very deep; in the west course there it ran from possibly three feet to five or six feet on this low ground.

As to the width of the water in 1921 on that low ground, between [339] my house there and Wibaux, —oh I was talking about this where I said it was from three to six feet deep, that would be west of my house. There was some water on the low ground north of my house in 1921. The width of that on the low ground north of the house, well you would go possibly five or six rod in a northwest course and you would get to the corner of this little three-acre patch that we talked about, and when the creek would raise from four to five feet, a little of that water would run down to the edge of this three-acre patch and formed a small stream. That water would run along there three feet deep and five or six feet wide, but if that would run today, tomorrow you would be liable not to have any stream at all there; that would be the way it would work.



(Testimony of Tom Rush.)

It very seldom came up there during the days I was there; it was higher on that other side of the creek and lower on this side—on the left hand side it was higher, and when the creek would raise five or six feet, this bank would naturally throw the water over this way onto the low ground. As to how often I have seen the water up on that low ground in my whole life—well, that would come when this creek would raise a little bit and it never did any damage when it come on that low ground—we never thought much of that. I used to like to have that come; I used to irrigate my potato patch with that stream. The stream wouldn't come up every year and irrigate the potato patch; that was just once in a while; I wouldn't plant potatoes there every year. As to the width of this water all across the flat—well, in a northwest course that was pretty low ground; I suppose it would be safe to say that that would be very close to a quarter of a mile. This high bank on the left hand side of the creek threw this water over here on this east side; that was any year you might say, but in 1921 we had more water there than I had ever seen you know. It wouldn't get a quarter of a mile wide there most every year. Other years there it might run out from the creek [340] possibly two or three rods, something like that, but it would take an extra big rain, something like 1921, to throw this water the quarter of a mile. I remember the road running down here east of my house. That stream that I was speaking of going close to the two or three-

(Testimony of Tom Rush.)

acre patch, did not run around close to the road. That was one place it ran within three rods of the road. As to where that was,—here is the three-acre patch; it never did get under water; well, this water that we speak of ran along here and it came down here—this would be the little creek that I speak of, and that would come along here and take a bend over here and take it within two or three rod of the main-traveled road—if that is it. Is that my road? Yes, that is the road; this is north up that way.

Mr. HALL: You came from town and you drove down this road and you turned to the right, and the creek comes down from the south and turns to the left there.

I wanted to get to the northwest corner of where that is you are figuring there. That is right about here I should say—right by the corral down there; you might say I didn't have any corral; I used to use the stockyards. Where do we strike this little three-acre patch? Here it is—that was never under water.

Q. Looking from the three-acre patch towards the southwest——

A. I mean northwest.

Q. I mean southwest. Now, Mr. Rush, looking from the bank here on your three-acre patch towards the southwest, how often have you seen the water there get 600 feet wide?

A. Oh, you are “crazy” now; don't talk like

(Testimony of Tom Rush.)

that,—oh, wide? I thought you meant high; oh, I thought you were crazy——

The COURT: I think we will terminate this conversation here.

(Recess until 1:30 P. M.)

I don't know "very much" about 600 feet wide right across from my house there; we never bothered with that other kind of work [341] at all; my work was with cattle. Right straight west of the house I have seen the water pretty near that wide, that is half of a quarter of a mile—600 feet would be about half of a quarter of a mile? But I haven't seen it very often. I don't think I can say I saw it like that more than twice in all those years—I couldn't say what years; I didn't keep track of all that kind of work you know; one was in 1921; I couldn't quite say when the other was—it was not quite so wide. I couldn't say how long it was before that; I never kept track of that.

This morning I spoke of water being backed up by ice. I didn't see that the ice got caught anywhere; there was ice on each side of the stream as it was melting you know, and the main creek breaking up; I couldn't say that the ice was stopped anywhere in particular.

For a number of years I always got my own coal right near the house.

Mr. MAURY: Come over here Mr. Rush.

I tell you, your "blackboard" there gets me rattled; it is a fine way to get me rattled monkeying with that "blackboard". Here was my house. It wasn't very far southeast of my house where



(Testimony of Tom Rush.)

the coal was mined in the creek bed. They didn't mine coal there for 40 years; it might be safe to say I used to get some there for my own use for possibly half of that time—20 years. I didn't allow other people to mine there so very much, because I thought there was enough there for "this boy" himself. If you bring a load of coal home for your own use, you know you wouldn't call that "mining". We went under the surface quite a little ways; the surface fell in finally, but not worth speaking about. As to whether the ground was lower at the end of my mine than it was before, will say that the water used to work it down a little bit lower. [342]

Redirect Examination:

The main traveled road going to Wibaux, is just east of my house a little ways. During all the years that I lived at that place,—whether water ever got up between my house and the road, will say that I could never get enough water on that three-acre patch to honestly wash my face—that is, a good washing—all those 30 or 40 years.

After the 1929 flood I went in to Wibaux, I would judge it would be from three to four days after the flood, and when I came to Wibaux I came a little ways north of Mr.—that man you had here—Burke?—a little ways north of Mr. Burke's; we went probably a half a mile west. We did go down north a half a mile and then a half a mile west. When I came in to Wibaux after the 1929 flood I

(Testimony of Tom Rush.)

came past Jim Linn's place and came down past Burke's place. On the way in to town, I saw evidence, or high-water marks, or things to indicate that there had been a flood; the country seemed like it was "struck with lightning" or something else; there seemed to be marks out on the west side of the road possibly half a mile in places, and big posts and fence and wire all scattered through the country—it was pretty bad.

Q. During all those years you lived there, had you seen anything like that before?

Mr. MAURY: We object. This witness wasn't in that country; he was postmaster in Wibaux. This is taking too much time.

The COURT: Lay the foundation Mr. McCarthy.

When I was ranching south of Wibaux I had on my ranch cattle and horses. During those years I had occasion to go to the south of where I lived; I had lots of business, and I had horses south and southwest of town, and I had cattle running north and northwest of town. My work was on each side of the track. I had been up in the direction of where Burke lived and where Linn lived, during [343] the years I lived there, and before either one of them commenced to live there, I commenced to go up that way. As to how often I went up there,—one summer I kept cattle southeast of Mr. Linn's; there wasn't no fence—the country wasn't fenced at all, and there was lots of feed there and they was along on the creek.

(Mrs.) MARY EDIGHOFFER,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is Mary Edighoffer. I live at Wibaux; have lived right in Wibaux since 1919. In June, 1929, I was living in Wibaux in the very south edge of town—south side of town. I was living in the south side of town in 1921, but not the same place—or same location. That is what has been called here the Davis Addition.

In 1921 I observed high water in the Davis Addition, referring now particularly to June, 1921—June 17, 1921. Telling the court and jury what I observed on that date with reference to high water in Wibaux and particularly in the Davis Addition, will say that it rained—hailed first and then rained pretty hard—and of course, the water come up pretty high from what they call the Possum Hollow, I think, down through Ira Parks' and in right back of Tom Sletten's house; then it came from the east and down along the railroad track right in north of the railroad there. It came down that draw north, a ways. When I speak of the track, I mean the main track. The direction, generally speaking, that that water was moving,—well, it struck the creek, of course, and it went north. I did not see any water backed up there from the railroad bridge. On that afternoon of June 17,



(Testimony of (Mrs.) Mary Edighoffer.)

1921, I was down town until after the rain quit and the water went down a little. I run the laundry down there for William Phon. When I [344] went home, the direction I took, I went out east and across the bridge and then across the foot bridge home. That would be the county bridge—then along that foot path. When I got to the Davis Addition there was some water in the Davis Addition. As to how deep it was—oh, it wasn't very much around just puddles around there; there was some on that cinder walk—it washed out some of the cinders you know, and there was some in there. I did not at any time there on June 17th, see any water in the Davis Addition other than that coming down from Possum Hollow or off of the east hills.

I was at home on the night of June 6th and the morning of June 7th, 1929. As to what I observed in the way of a storm and the high water on the night of June 6th and the morning and day of June 7th,—I don't think I slept very much at all; I kept dozing off and I was waking up and it was raining every time I wakened up. I had my head to the west window and I raised up the curtain when lightning come, to see how much water was getting around there. There was water getting around there—I should say there was—a good deal of it, but it kind of run down you know, from the time it was good and daylight, and I said everything is spoiled anyhow and I won't get up until it got day-

(Testimony of (Mrs.) Mary Edighoffer.)

light. At daylight I got up. After I got up, I went outside and let the hens out that was setting on—that had little chickens, and the chickens. I got the fire built. I heard so much noise. First, I noticed Sletten's horses up on the hill south of there; they acted like they were afraid of something; they would come up and they snorted and were looking back south, and you could hear noises—different sounds. The horses would whinny and cattle would be mooing, and you could hear a rumbling noise like water running in it and something of the kind like cracking and snapping once in a while.

I went down towards the creek. I went down that cinder walk [345] on that foot bridge and pretty near to the county bridge and I could see the water acoming; I saw the water acoming from the south. Describing to the court and jury what I saw there in the way of water, well, there was one—I don't know what they call it—wall of water or wave of water—I don't know what they call it—but it looked like it was two or three foot deep, rolling down, you know. That water two or three feet deep, was rolling along across from Massey's north field. When I went down to the creek, there was some of the neighbors digging and letting water out of their garden; they wanted to know where I was going. I says, "I want to see what happened here; I believe we are going to have a flood here," and then there was quite a few of them come down there too. That roll or wall of water came down



(Testimony of (Mrs.) Mary Edighoffer.)

and it put the creek out of its banks—put the creek out of its banks all along, as far as I could see, and there was lots of trash along with it, trees and boards and stuff like that. These trees and boards and trash lodged against that county bridge and foot bridge.

Q. What effect did that lodging of trees have on the county bridge?

A. There was another high roll of water came down,—I don't know how high it was, but it looked six feet deep or more, and it came down rolling and carrying everything with it as it went. It seemed to be carrying with it all kinds of small buildings like chicken coops and outbuildings that way, and some pigs, chickens and calves, and one horse that I saw. That wave or roll of water went right north as much as it could, but it widened out there where it got flatter, but back of Sletten's and Ostby's place, the bank must be 20 foot anyhow, and when it got past that bank, why of course, it let it widen out.

I know where the green house is that Mrs. Miller used to live in, and I know where the city water tank is. I saw water over in that part of town. As to what I saw there in the way of [346] water,—well, this high wall of water that came down cut right straight across there, you know, and there was the Mozier house, they call it,—the yellow house—and when it struck the house, (it was pretty close to the banks of the creek; it was closer than it is now, because it has been moved back, since the



(Testimony of (Mrs.) Mary Edighoffer.)

flood), and it kind of give a couple or three times and it kind of popped right up and went off like a cork; the water—the house too, was gone. The house was right close to the bed of the creek. It was west of the city water tank, kind of southwest like—a little bit south and west, because it was right close to the bank of the creek. That yellow house went down in by Orgain's house.

This water that I saw carrying these various articles that I have described—small buildings—I said that they lodged against the county bridge. As to the effect that the lodging of those buildings had on the county bridge, of course it would stop the opening in the county bridge. The water went over the top of the foot bridge and over the top of everything, over the cinder walk and over all that,—of course, when it came across there, it came right over Sletten's—it came right over Sletten's back yard and Ostby's too, because it came straight up through from Rush's field and when it got there, it was flatter—it gave it a chance to spread out. Rush's field and Massey's field is the same thing. Of course, when I first come there it was Rush's and it was changed to Massey's. Well, that water took that green—well, they call it a garage,—Drake did; it was quite a good-sized green building; they had a barn, garage, feed and something like that; it was very near down to the bank of the creek, south of Mattie Miller's—there was a building south of the green house. When this high wave of water struck

(Testimony of (Mrs.) Mary Edighoffer.)

that building, it knocked it off the foundation and it come down into the creek and when it struck the county bridge, it seemed like it turned up this way and when it struck that bridge, it raised right up over that bridge [347] that way and crashed, and that pretty near stopped all the county bridge—stopped anything going through it. And all this time there was other stuff coming and filling it full.

Q. Did you stay and watch it?

A. I didn't stay there very long after that. I stayed until the Methodist parsonage got about half way from Charlie Dahl's blacksmith shop down to the bridge. You see, it came straight down. There used to be a street where that old engine stands,—until it struck the creek; and then it turned and went north to the bridge and about the time it got half way to the bridge, there was too much water for to stick around there. I did not notice anything with reference to the railroad bridge at that time. When the Methodist parsonage started to come and the county bridge was blocked, I started to get out of there—I had to. I went home. There was lots of people around there and of course they all had to get out of there. Some of the people were,—Roxey Trollope, her name is Hines now, she was right close; Trollope and Frisinger, and I don't know who else; and I think Tom Sletten was there, and Mrs. Sletten. I went home and there was a lot of them went that far with me, because I was out far enough south, so there wasn't no water around there then you see; of course, none of us had breakfast—

(Testimony of (Mrs.) Mary Edighoffer.)

I don't think anybody had. So I asked them to come in there and have some coffee and a lunch with me. So, we hunted up dry stockings and dry socks for some of them and we had some breakfast and there was quite a few eat breakfast there,—I don't remember how many because there was different ones coming in and going out, besides the ones that stayed for breakfast. As to whether I remember in the city of Wibaux, of someone having some grading machinery in there at the time of the flood, there was an old grader of Johnnie Jones' that stood there since I can remember—I don't remember how many years, it stood there right to the north end of my garden. I don't know those streets by [348] name over there. As to what happened to the grader, well my garden fence went and it wrapped right around it and it tipped the grader right to the north. The grader was made out of solid iron and steel. I wasn't down there to see what did happen to the county bridge that day; I know, but I didn't see what happened. Later on, I saw it. It was sitting on the west bank of the creek about half way down to the depot, after the flood. I saw the Methodist parsonage after the flood; that was sitting up on the side of the railroad embankment.

Cross Examination:

(By Mr. Maury).

Q. Mrs. Edighoffer, you were at a trial of one of these cases over at Baker?

A. Yes, sir.

Q. You heard Ed. Trollope say that a tree float-



(Testimony of (Mrs.) Mary Edighoffer.)

ing down knocked that grader over, didn't you?

Mr. McCARTHY: Objected to as not proper cross examination.

The COURT: That might go to test her recollection as to what happened.

A. Well, it needn't to be the tree that knocked it over, and I don't know as it was. This grader was sunk down into the ground probably a foot deep or maybe more, sitting there for year after year, and the dirt every year from rains and so on, would naturally catch on there and bury the wheels down quite a bit. Some object that day, turned it over; it was turned over, of course, by things hitting against it. I said that it was turned over by my fence,—well, all the stuff was against it, but my fence caught around it. This corner post stood solid and it was five wires on the fence and when the fence went out, it hit against the grader and it made it that much more would catch it. The evening before June 7th, it didn't rain any to amount to anything, that I remember of, until about 9:00 o'clock at night; it was [349] after I went to bed. It rained pretty hard then by streaks. I don't know as I was nervous during the night about high water, but the rain kept waking me up. When I first got up in the morning, the water in Beaver Creek right opposite from my house, it was quite a ways from my house to the creek; I couldn't tell you how high it was then. I can't tell you exactly how soon I got down to the creek, because I got a fire made and got water and attended to the chickens and geese and stuff

(Testimony of (Mrs.) Mary Edighoffer.)

I had, so I don't know. I lived close to John Bailey; I think he was living over on the hill—he moved back and forth so much, during the spring, I don't whether he was up there or not. I don't remember whether I saw him going to work that morning or not; I might have, but right now I don't remember. I don't know what time he usually went to work; he went to work different times. As to how the creek looked when I first saw it that morning of June 7th, well, the water had run off from all around there; there was a lot of water in the night; when lightning would flash, you could see water was clear across the road from my house.

Q. Now explain where your house is Mrs. Edighoffer. Come here and show us on the plat where your house was then? \* \* Where do you think it was?

A. Somewhere in the second block from Sletten's on this side here. (That is east) \* Here is the Ponke house, and coming down here. \* It must be there. \* I believe that is it. I won't swear to it,—\* east side of Beaver Street.

Q. It is the east side of Beaver Street and south of this thing marked Lincoln Avenue. \* There is the Edighoffer house (pointing).

Telling what I did around my house that morning after I got up, I looked after my chickens and poultry, and chicken coops; some hens had eggs and some had little chickens, and some had little ducks and some had geese. I didn't get breakfast for a while; I haven't any idea when I got it. I went

(Testimony of (Mrs.) Mary Edighoffer.)

down from there towards the creek. The creek when I got there, wasn't out of the [350] banks much, only in low places spreading out a little; it wasn't out of the banks much. It was out of the banks down there by the kind of a green house—Mattie Miller's house you call it; it was running out a little bit, but not much. When I first got there, it wasn't touching the Mattie Miller house—nowheres near it then; it was just out of the banks, that is all, but nowheres near the Mattie Miller house. I couldn't tell you what time those trees came around here and went to the county bridge, but it wasn't very long after I got there. The grader hadn't turned over when I first got there—I should say not; I don't know what time that turned over. Nobody has told me to say, when I am asked about times that things happened, to say "I don't know"; nobody don't have to tell me——. I don't know. I said the water got up around Ostby's house. As to when it got up around Ostby's house, when that high roll of water come down the creek. There was a little roll of water—small roll of water, maybe two or three foot high at first, and that put the creek out of its banks. I wouldn't attempt to say what time in the morning that happened because everybody was working and running here and there and I don't know what time it was—people wouldn't think about the time; people was excited—I should say they was. When I first got out, there wasn't anybody looking at the stream—until I went down the street and told them,—them that was outside I told them there was going



(Testimony of (Mrs.) Mary Edighoffer.)

to be a flood, and I went down to the creek to see if I could see anything. As to whether the first debris, trash and everything all went to the county bridge or not,—well, there was an awful lot of it stopped there and it couldn't help it; there was so many planks,—and trees uprooted and different kinds of machinery; and pigs and calves, and there was one horse came down before this green house, or Mozier's house went out; that big roll of water "fixed" the whole thing. It wasn't very long after this debris, pigs, trash and things stopped at the county bridge before that [351] second wave that I described, I haven't any idea how long, because everybody was talking and everybody looking and running this way and that. Tom Sletten was down there at that time—when that second wave came,—his wife, and he got in his car and took his wife out of there. I think he was there when the first wave came.

I know Edith Jones. She was there pretty shortly after.

Q. How long before or after?

A. How long before I don't know; I know she was around there after. When I first saw Edith Jones that day she was riding a horse.

That wave that came across and struck by Ostby's house looked to me like six foot deep. That was after the first wave that lodged everything at the bridge—not everything, but it lodged quite a good deal at the bridge. I don't know whether it was one hour afterwards, or half an hour, I don't know;

(Testimony of (Mrs.) Mary Edighoffer.)

I wouldn't say the exact time of no time, because I have no way of knowing.

Q. Did the water look like that Mrs. Edighoffer? Now, this is from the Davis Addition——

Mr. McCARTHY: At what time Mr. Maury?

A. Well, there was water everywhere.

Mr. McCARTHY: May I ask what the witness is being shown? What are you showing the witness?

Q. I want the witness to tell me what it is.

Mr. HALL: Counsel is now showing the witness a photograph——

Mr. MAURY: We object to coaching the witness against our cross-examination——

The COURT: Quiet down; what is the matter with you?

A. I can't recognize what is on there.

What water came into my place where I lived on June 17, 1921, come down that Possum Hollow.

Q. Your place across town—you had a laundry did you not?

A. Not in 1929. [352]

Q. I said in 1921.

A. I understood in 1929.

Q. In 1921 where did it come from?

A. It come down Possum Hollow and that other draw north of the railroad.

Q. And your other place was right back of the First National Bank in Wibaux in 1921, wasn't it?

A. It is the very last building next to the county bridge there, right beside Ole Helvig's harness shop. That water in 1921 that got in there come down

(Testimony of (Mrs.) Mary Edighoffer.)

from Possum Hollow and north of the railroad track. Water from north of the railroad track did not get into my place of business in 1921. Water that came across the creek did get into my place of business in 1921. As to the depth that it got into my place of business in June, 1921,—13 years ago,—there was very little that got in there; if Louie Phon hadn't opened the trap door—he had chickens in there and he was afraid they was going to drown, and when he raised the door up, the water come in and spread over and it didn't amount to anything. That was from the creek, and it come down Possum Hollow.

As to how far south of Ostby's house that second wave struck, well it spread out as soon as it got there where Clarence Chase used to live south of the creek; it rolled down there south of the creek, south of where the creek bends there to Sletten's—the bend by Ostby's house and Sletten's there; the wave came and got right out by the bend here—went over right by Ostby's house—went over that steep bank there. I do not know what time of day that was; I had no thought of looking what time of day it was; I had something else to think about then. Ostbys was there when that wave came over and Slettens was there when that wave came over. That wave must have been more than three times as high anyhow, as the first wave I saw. That wave did not come from towards the water tower across; it came across Massey's pasture. That is Massey's pasture that you are pointing to there. As to whether it came through those houses you are pointing to there, will say [353] that it came right



(Testimony of (Mrs.) Mary Edighoffer.)

through Pete Cramer's house, if you know where that is. You might be pointing to Mrs. Cramer's yard. Mrs. Cramer might be there that day; I am not sure either. Ostbys lives east of Cramers. I know who lives east of Cramers, but I didn't then. As to whether that wave came by where I live now and struck towards Ostby's and Sletten's houses, will say it didn't go quite to them houses there, but it spread out there; it cut right square over that high bank by Ostby's and Sletten's—that high bank that you are pointing to. Giving you some estimate as to how long that wave was, it was clear over from towards Pat Coyne's—well, from over that direction; I couldn't see exactly how far. Pat Coyne's is across the river from Massey's.

Q. And it came from Pat Coyne's direction straight away towards Ostby's?

A. It came up there so that it spread out from Pat Coyne's—not to Pat Coyne's, but up that draw towards Pat's; it spread out that way towards Pat Coyne's. It was moving to the north, but it spread out towards Pat Coyne's, some; that is, it was widened out that way where the bank was low—here the banks was shallower, of course, it gave it more room to spread out. I don't know how high that wave was where the banks were narrow. When I looked across there, it was clear across as far as I could see; it was that high wave coming down. As to whether I noticed that wave going across towards the water tower, will say I noticed it when it struck that yellow house of Mrs. Mozier's. The

(Testimony of (Mrs.) Mary Edighoffer.)

yellow house give two jerks that way and went north. I don't think I saw the house catch on a pole—there was too much water there. There was a good deal of water around there when that wave struck the yellow house. Just a second after it struck there and struck that green garage of Drake's, well it wasn't very long, and it struck that high bank back of Ostby's and Sletten's and it came over Sletten's and Ostby's yard, and Ostby had a stone wall two and a half foot high, and it went over that. That wave went [354] over the rock fence around Ostby's yard. I don't know how deep it went into Ostby's house; it went into his windows—his basement—his basement windows. On the south side of the house it went into the basement of the house, and it may have gone in on the north side, as well as I know; it may have gone in on the north side too. I can't tell you what time of day that was it went into Ostby's windows; can't tell you what time of day any of it was in particular, because I had no thought of the time.

Q. Did you see anybody cross the county bridge that day, before the flood, going out from Wibaux?

A. I saw myself go across that foot bridge. When I first went down there, I didn't stay long either. As to the condition of the ground under the foot bridge when I went back, it was all right then for a few minutes; the water come under there pretty mighty soon after that. When it first come under that, I should think it was a couple foot deep, maybe a little more, maybe a little less. The width

(Testimony of (Mrs.) Mary Edighoffer.)

of it, when it first came under the foot bridge,—well, it filled the creek bank-full and clear out across that way—I don't know what they call it—they used to have a tennis court there or something, and it came clear under the foot bridge. I started back towards the Davis Addition before it came under the foot bridge. There was quite a few with me,—I think Roxey Hines (Roxey Trollope)—Roxey Hines; there was a good many of us; there was a number of us—I couldn't tell you how many or who they was. At that time I could have gone across the county bridge to town, but I didn't want to—it didn't look good; it didn't look like I could get back, maybe. The trees hadn't lodged there then,—not until that big wave came. Oh, there was a little trash, but nothing to amount to anything; that big wave filled the thing full.

Q. You said you could cross the county bridge, but you didn't want to. That didn't mean you didn't have any business in town, but that it was that the bridge was peculiar?

A. I had business [355] in town, but it didn't look good to me, the way the water was coming down there you might be caught where you couldn't get out; and I felt like over in town was a little further from the hills at that time too, and I had no reason to go over there. So I went back towards the hills, or where I could get to the hills, if I wanted to. I think Roxey went back at the same time I did, and she might not, because there was



(Testimony of (Mrs.) Mary Edighoffer.)

some coming down to look. When I came back this way, the water started to come under the foot bridge or sidewalk—the raised walk—under it and over it and everywhere else. It didn't stop them from going when that wave of water was coming, I can tell you that. As to whether it stopped them coming,—well, it wasn't that whole length of that foot-bridge. It was somewhere about the point you are pointing to when I started there; it was around so it hit the corner of that foot bridge; it was at the corner, the angle, somewheres about there, was where it was when I started back. As to the way the water rolled then, it was going north then; it was not going out over the county road then; it got out over the county road when that second roll of water came down.

As to the depth of the water up near the green house when I came back from the county bridge, it was clear over Sam Austin's car. You probably know what kind of a car he had better than I do—Chevrolet, or something—it stood on the south side of the house, and the water was over the top of that. Sam Austin's car was standing right by the green house, south side of the house.

Q. And when you came back up the foot bridge and looked over that way, the water was over the top of Sam Austin's car?

A. No, sir, it wasn't; I got out of there before that, yes, sir. As to whether the water was over Sam Austin's car when I started walking towards the county bridge,—there was no water there.

(Testimony of (Mrs.) Mary Edighoffer.)

Q. When did you first see the water over Sam Austin's car?

A. Well, it was awful quick, a mighty few minutes—if it was minutes at [356] all; it was pretty quick.

Q. What I want to know is whether you saw the water over Sam Austin's car or around Sam Austin's car as you were going towards the county bridge or as you were coming back, or as you were standing at the county bridge?

A. It was after I got back and I was standing over by Ostby's, that roll of water came down and it came down over the stone wall and over Sletten's yard, and we kept moving out of there, because the telephone poles was going down and everything, and we was getting out of there as fast as we could.

Q. Were the people moving north to south out of their houses that morning?

Mr. McCARTHY: Objected to as repetition.

The COURT: That is a pretty general question; that covers a large territory.

Q. In the Davis Addition I am asking about. I am pointing to the model.

Mr. McCARTHY: We have no objection to counsel continuing as long as he wants to, but Mr. Hall is afraid your Honor will get impatient.

The COURT: You have repeated yourself a number of times, and I have tried to be patient thinking you would change to something else. Let her answer this question.

(Testimony of (Mrs.) Mary Edighoffer.)

Q. Did the people in the Davis Addition move out of their homes on June 7th, from north to south?

A. Why, of course they did.

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Testimony of

(Miss) EDITH JONES,

who had been first duly sworn as a witness in behalf of the defendant at the trial of Case No. 2444, Wibaux Realty Company, a corporation, (and other cases) vs. Northern Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on [357] the 12th day of January, 1934, was pursuant to stipulation, read at this time by the court reporter, as follows:

“Direct Examination by Mr. McCarthy:

My name is Edith Jones. I live at Glendive, Montana. In June, 1929, I was living two and a half miles south of Wibaux; was living with my mother and my brother. We were about a half a mile I think, to the east of Beaver Creek; it might not be that much, but near that. I am 22 years old. On June 6 or 7, 1929, I was living with my mother and brother out at this place two and a half miles south of Wibaux. I know it stormed that night—June 6th—I don’t know what time and I don’t know how bad a storm, but it brought up the dry



(Testimony of (Miss) Edith Jones.)

coulees, and there is one on each side of the house. I got up on the morning of June 7th shortly after daylight—maybe 3:00 or 3:30, I wouldn't want to be exact as to time. As to what I observed when I got up,—just south of our house there is quite a deep, dry gulch; there is a graded road—there is a grade across this and two culverts there, and the water was running over the grade at this time; there is a bridge between our house and our barn and it covered this to quite a depth. I had lived at this place 17 years. Comparing the water I saw on the morning of June 7, 1929, with any water I saw before, will say that in 1921 there was a great deal more water there than there was that morning; there was a lot more water there in 1921 I think, than there was that morning.

After I got up and saw this water, I went down by the bridge that is between our house and barn and I knew I couldn't cross by foot. Our saddle horse was on the other side. I went south from our house and crossed the road grade. The water was down then and maybe an inch or two,—it didn't bother me to walk across it and I went to the barn and saddled my horse and rode south so I could get a fairly good view of the creek. As to where I rode to this first time,—right south of our barn there, there [358] is a cutbank; it is a slope from the barn, but it is a cutbank on the south side. When I got over in the vicinity of the creek where I could see the water in the creek, I

(Testimony of (Miss) Edith Jones.)

sat on the horse watching the water there in the creek and the different gullies as they came into the creek. The creek was up, but it wasn't serious; it was like Beaver Creek is when there is a hard rain. It drains a lot of territory and there is lots of drains into the creek; and I could see that it was raising, but it wasn't serious right then. There was a draw right south of me quite a little ways and there was a lot of trash coming down in that, and I rode across and rode down to this draw,—that was a draw emptying into Beaver Creek. Well, I crossed this and there was right over the culvert, a hill south of that and I rode up on that where I could get a better view of the creek. When I got up on the hill, I looked at the creek most of the time. The creek was coming up all the time; I could see that it was raising quite rapidly. Then I turned and went back then to where I had first seen the creek, it was directly south of our barn,—I went back to our own barn; it is directly south of the barn. My curiosity got the best of me again and I sat there and watched the creek for a few minutes. As to what I saw happen to the creek at that time,—the first I noticed anything different, I could hear a muffled roar, it was almost like thunder, still I knew it wasn't thunder; it didn't have exactly the same sound thunder has. After I heard this muffled roar that I speak of, I looked down the creek to the south, down towards Clem Parker's place and I could see a bank or low wall of water

(Testimony of (Miss) Edith Jones.)

coming then and boiling from the bottom to the top. The bottom seemed to be going faster than the top of it, because it was boiling up—rolling up. As to how wide this water was that I speak of, will say that in some places along the creek between where I saw it and where I was, there was some very definite banks,—there were steep banks on both sides of the creek. [359] There, it wasn't so very wide, but it spread out to a quarter of a mile wide, maybe wider.

Q. How high was it?

A. About so high.

Q. Indicating what?

A. That high.

Mr. McCARTHY: All right; may we have the yard stick? (measuring) About three and a half feet, would you agree on?

Mr. MAURY: We agree Miss Jones pointed to 3½ feet.

Somewhere about three to three and a half feet in height, that is what I mean. That doesn't mean the water from the bottom of the creek to the top of this wave; it means from the bottom of the wave. From the bottom of the wave to the top of the water, it was 3½ feet, it seemed—to the top of the water above that. After I saw this wave or wall of water coming down the creek, I watched it for a few minutes and you could see back of this wall of water to the south, I could see a more definite raise of water. I mean by that, that maybe a quarter



(Testimony of (Miss) Edith Jones.)

of a mile back of this first wave of water, there was another one that seemed to be larger, but it was coming swifter and it wasn't boiling as much; it was smooth; it was steadier, and then back of that there were several smaller ones. After I saw this condition—well, I don't know why, but I went north to where I could get through the fence onto the road again, the east side of our place, south of the house, I cut across the field and down the road past our buildings and across another culvert and into another one of our fields, and then west again to the creek. This wave of water was still to the south of me when I got there; it hadn't passed me while I was going around, but it was still to the south of me, and I followed it then or went with it; I went along to see what happened or what it did. Well, I went about a quarter of a mile, I believe it is, across to the west side of that field and I had to stop to open a gate. Quite a few of the gates are on a knoll, I [360] couldn't say how much higher than the surrounding land,—it was on a knoll, and there were two cows there belonging to Mr. Parker on the hill east of there. I opened one gate and I drove one of the cows through and upon the hill, and as I was going off the hill, I had to wade this horse through water; the water had come past me and surrounded the hill and there was quite a bit of water around. In taking that horse through the water she had to fight; the water was so swift for her, it was hard for her to stand; she labored to

(Testimony of (Miss) Edith Jones.)

cross it; the water was almost up to her flanks—maybe it was to her flanks, I wouldn't say exactly. Well, I got through this water and I went straight north,—I drove the cows a little to the east so they would be out of the water—and then I went directly north to the hill,—to the hill directly south of the Davis Addition. There I opened the corner of Mr. Sletten's fence, loosened the wires and let my horse through. When I got through the fence, I could see the creek roaring and at places I could see it—there was still places I could see the creek. That was the roar of water coming down the creek. When I got through the fence, I wanted to get down town, to get to the Davis Addition. What I first wanted to do was to get on the highway bridge to watch these waves of water as it went by, but to get to the Davis Addition I had to go west, but the water was on the west of me and I had to go east; and there is a plot that is fenced there south of the Davis Addition and it extends into the east edge of Possum Hollow, and I went around the corner of this and I had to put my horse again to get to Possum Hollow. The water in Possum Hollow was coming from the east. I didn't see any water coming at that time from Beaver Creek back up towards the Davis Addition. The water from Possum Hollow was running north real swift. When I got over this fence just beyond Possum Hollow, I didn't stay there, I broke my horse into a run then; I run

(Testimony of (Miss) Edith Jones.)

her down to the Davis Addition and down the main street of the Davis [361] Addition,—I don't mean the main street of town; I don't know the names of the streets—what I could call the main street of Davis Addition. Then I slowed my horse down as I passed some buildings there; I didn't stay there, but I stopped and I slowed my horse considerable, and I went about half the length of that elevated foot bridge that is there on the Davis Addition; I didn't go down the foot bridge, I went down the road. I have ridden a saddle horse on that foot bridge; you are not supposed to, but I have. That morning, I did not ride on the bridge; I was just a few feet to the east of it. I observed while I was a few feet to the east of the bridge that the creek was coming up so rapidly and this wall of water had just cut across the country directly north of Mr. Massey's buildings and it had spread out then and it wasn't near as distinct a wall of water as it was before, but I could still recognize it. As to what this wall of water did—where it went to—there is quite a quick creek bank there, but it didn't have much effect on the water,—it went right across the flat to—well, from where the creek turns to swing east, south of town, it come across there to the north, it went through the town—through the buildings, the residences. There has been a building referred to as the green house—the Mattie Miller house—I know where that is. This water went, with reference to the Mattie Miller



(Testimony of (Miss) Edith Jones.)

house, it was some to the west of that where it first crossed the creek bank. The water got up to the Miller house. There was an object near the Miller house that I could catch the height or depth of the water by,—there was a car sitting alongside the Miller house and it covered that; the water covered the automobile alongside of the Miller house. From where I was, I couldn't be accurate as to how far to the west this wave or wall of water extended, but I believe it went to the west of the Kinney house; I am sure it went to the west of the Kinney house. This car that was alongside of the Miller house was an open car. I didn't stay [362] there at this place; I turned around and went back to in front of Trollope's house and there was water that morning coming from Possum Hollow, the runway from Possum Hollow where it runs down into the town, it wasn't cutting across or anything.

Q. What about the water coming down by Massey's and Mattie Miller's house and through there, did you see any other unusual conditions in the water in that vicinity?

A. Just how do you mean?

Q. Well, I wondered whether anything unusual happened in the way of water at any other time than this one wave of water you saw?

A. Yes, the water came on, it kept rising there. That water went, when it was rising, through the residential district, west of the creek. By west of

(Testimony of (Miss) Edith Jones.)

the creek, I mean that part of the creek,—well, where the creek turns northeast of the Mattie Miller house.

I saw more than this one wave or wall of water in the vicinity of the Miller house and that section of town; the rest of the other waves of water that I saw coming they were spread out then until they weren't nearly as deep or nearly as thoroughly defined, but they were still distinct raises in water; they didn't attain as great a height as the first one. These other waves of water that I speak of went across the valley that Wibaux is in; they went into the town.

Q. Did you see any buildings or any property moved there that morning, any time you were down there in the vicinity of—after you got into the Davis Addition or when you were down near the county bridge, or when you had come back near Trollope's house, did you see any buildings or sheds move there?

A. There was a green shed there by the Mattie Miller house that washed away; it was sitting just south of the Mattie Miller house before—it went with the house; and there was a yellow house, I didn't see that move off its foundation, but I saw that when it was in the water. As to where the yellow house was when I saw it—well, there is a place that I have always known as Cullen's place; it [363] is where Tom Parker has his—it belongs to Tom Parker now. I believe I can point out on

(Testimony of (Miss) Edith Jones.)

the relief map where this yellow house was when I saw it moving; that (indicating) is the yellow house I believe it is supposed to represent, and it was down about in there; it would be about down in that far when I saw it. This is the house; it was down in here; it wasn't back of the house; it was on this side of the house.

Mr. McCARTHY: The witness indicating as the yellow house a point approximately two inches east of the easterly part of the city water tank.

That is where the yellow house had been. When I saw it, it was moving north, and it had already got as far as Second Avenue South when I saw it. It was moving when I saw it—slowly; it didn't have much speed. I wouldn't be positive when I saw the yellow house with reference to these waves, but I think three of them had broke on the highway bridge before I noticed the yellow house—before I paid any attention to it. The best that I can say, I believe the shed that was moved away from the vicinity of the Miller house lodged under the county highway bridge.

As to how the water—how high the water got there in Beaver Creek that morning or where it spread to, while I was there, it spread up to somewhere on the Davis Addition, I don't remember just where the water stopped along the Davis Addition, but it was quite deep in other places. The water I saw in the Davis Addition was moving towards the north.



(Testimony of (Miss) Edith Jones.)

There was a bridge to the south of Massey's place, it may be a mile; I don't believe it is quite a mile, I don't think it is quite that far. I know that bridge was washed out. When this water struck it, I could see the bridge give; I didn't see it go. That was before I went down into the Davis Addition at all. That bridge was washed down into Mr. Massey's I believe. I wouldn't say that, it may belong to Mr. Woodhouse; it was down in this [364] hill between where it belonged and town. I don't believe this house that it was washed down to—the general location—is shown on the relief map.

Cross Examination:

(By Mr. Maury).

I have read the story of Paul Revere's ride—where he notified the Continental Army of the United States of the approach of the British troops, at Lexington or Concord, or wherever it was. That morning, I got up shortly after daylight, between 3:00 and 3:30 would be near correct.

Q. It was about the summer solstice was it? \*  
About the shortest night of the year?

A. Along about that time, yes. I believe that I got a very close vision of everything that morning. The sun rose before 4:00 o'clock I believe—close to 4:00; it was nearly 4:00 o'clock when the sun rose. Maybe that is the time the sun rose. I paid no attention to it close; I was going by that time of the year. It was around 4:00 o'clock that I first heard the roar of the waves.

(Testimony of (Miss) Edith Jones.)

Q. Around 4:00 o'clock the sun rose?

A. Maybe a little after that I first heard the roar of the water. My mother's home was maybe half a mile from the creek bank; maybe a little more—maybe a little less. I haven't any idea how high it is in elevation above the bottom of the creek. It would be mere guess work if I made any statement as to how many feet in elevation it was above the bottom of the creek opposite my place. It is maybe 10 feet,—maybe more. The water didn't get into my father's house.

Q. At all, in 1929 or 1921?

A. In 1921 the basement was full of water, but no connection with water in the creek or Possum Hollow. It was merely water that drained off the slope to the east of our house. Neither flood invaded the house of my father.

I believe that what appears in plaintiff's exhibit X-9 is a picture of what is known as the Mattie Miller house; it has a [365] bank in front of it; it is a green house; that is what I spoke of as the green house. That bank in front of it according to my memory, above the ground—above the stream bed, is maybe four or five feet, something like that,—maybe six; I haven't any idea about how far land is in feet. I could see very little of that bank when I first saw it on the morning of June 7th. I couldn't say that I could see any of it on the morning of June 7th when I finished up my ride; I couldn't see any of it—when I got there; I don't

(Testimony of (Miss) Edith Jones.)

believe I could see any of it when I got there. I don't remember if the water was around the foundation of the Mattie Miller house when I got there. I knew as soon as the wave of water struck it, it was up over the foundation, but before that—

I didn't cross the county bridge in Wibaux that day. It might have been 6:00 when I got to Wibaux; it might have been a little before that. I am acquainted with John Bailey. As to how long I have known him, I was quite a small girl when I—it is quite a while. I don't remember that I seen John Bailey, that I know of. I am acquainted with Mr. Massey; I didn't see him that morning; it might have been afternoon before I saw him. I am acquainted with Mr. Ostby; I saw him that morning; he was in the south end of the Davis Addition; I might have talked to him. I didn't notify him there was a wall of water coming down the creek. As to whether I beat that wall of water down or whether it beat me in the race,—it was coming; when I got there, it had already come to Wibaux; I believe I would say it beat me there; it beat me very little. As to how high it was when it got to Mattie Miller's place, will say that it wasn't as distinct as it was when I first saw it, and I don't believe it seemed to be as high; it was maybe two and a half to three feet high—maybe three feet. As to its width across country,—well, it spread out as wide as the valley would let it spread. As to its height when it passed Massey's place, I didn't see it then, I was out of sight of the [366] creek. My



(Testimony of (Miss) Edith Jones.)

father's residence is two and a half miles from Wibaux; there are hills between; by the road, there are four hills. I didn't cross the creek to go to Clem Parker's cabin; they are on the west side of the creek. My father's house is on the east side of the creek.

Q. Then how did you handle Clem Parker's cattle?

A. I didn't handle Clem Parker's cattle; it was Ira Parks' cattle.

Q. I thought you said Clem Parker's cattle?

A. No, sir, it was Mr. Parks' cattle.

Q. She said the Parker cattle. If you said the Parker cattle, you did not mean the Parker cattle?

A. I am sure I said "Mr. Parks' cattle." Mr. Parks lives up in the hills here some place. From Beaver Creek he lives maybe a little over a quarter or a half a mile, something like that, and to the east of Beaver Creek. They were milk cows; I believe one was a Holstein and the other a red-and-white cow; the Holstein was black and white. I didn't see this water as it passed by Parker's house; it was to the north of Parker's place; I never saw it at Parker's place. Parker's residence is not down the creek from us and between my father's home and Wibaux; it is still south of our place, probably a mile.

There are three coulees I believe, coming into Beaver Creek between our place and Ira Parks' place. When I started out that morning, there was

(Testimony of (Miss) Edith Jones.)

running water in those coulees, but it wasn't enough to stop a person going across—from going north.

Q. From going north. When did you cross them?

A. Some of them, I crossed them at different times, of course. I crossed each of them once that morning, but it wasn't at the same time that I crossed any of them. Those coulees are maybe a quarter of a mile apart—maybe nearer to a half—going over the hill, coming across the country. I didn't get down near the road at Massey's place. I didn't see the bridge on Beaver Creek go out—the bridge I spoke of as having gone out, the one up near my father's place. [367] I couldn't tell you what time it went out, I don't know. That bridge is between the place that the coulees enter the stream and Wibaux. One of those coulees drains the west half of section 19 and the other drains Mr. Parks' place. I would say that the area drained by the first one I mentioned was approximately half a section. I understand a section of land is 640 acres. Maybe it would be near 200 or 300 acres that it drains in there—maybe not quite. The other coulee that I crossed drains a quarter section of Mr. Sletten's land, and I wouldn't say how much of Mr. Parks' it drains; I never followed the coulee. I don't believe it drains half a section, it is less than that. When I first saw those coulees, while there was some water flowing down, yet one could easily cross on horseback.

(Testimony of (Miss) Edith Jones.)

Q. Did you cross on horseback when you first saw them and then go back towards your home?

A. I didn't go back towards my home until near noon. No, it wasn't quite noon; it was during the forenoon, and that was after I had made my visit down to Wibaux. The condition they were in then as to crossing them on a horse, there was practically no water in them; in puddles there was, but I don't believe there was running water in them. That water that came down those coulees with a rush that morning, as to when it fell or when it fell from the sky, will say that it rained before that; there was rain the night before. I don't know what time the rain was the night before. That was the water of the rain of the night before, that I saw. It didn't rain at all after I got up that morning—well, it was sort of a mist when I first got up, but I wouldn't call it a rain; the air was damp; you could tell it had rained just before that; the ground was what we would call "steaming".

Q. It had a "sweat". Buoyant to the spirit and the imagination?

A. Well, I wouldn't say as to the imagination.

Q. I was not protesting, by the way, on that subject, there will [368] be no objection to this record being used for a short story for a magazine.

A. If you can make anything of it, go ahead.

The coulee directly south of our house had the greatest rush of water down; it is between the house and the barn. That drained considerable more than half a section; (the one I described before was



(Testimony of (Miss) Edith Jones.)

north of the buildings). It drains one half section and one section and another section and another section, and I don't know how much farther east it goes after that. The rain that came rushing down that coulee formed before I got up. I can't tell you how much, in feet, that coulee is from the other coulee—the one to the north of the house—but there is the high-line runs past there, and there is two high-line posts in between. That coulee I described to the south of the house, is a little ways west of the house and a little ways east of the barn—runs between the house and the barn. I believe that that coulee may be a little above the bed of the creek, but it isn't a great deal. As to how far the floor of my father's house is elevated above the lower thread of the stream or where the stream is in high water, in that coulee,—it may be two feet, maybe not that much. You mean the floor of the house or the foundation? Well, I believe the floor of the house is on a two-foot foundation; there is a gradual slope, I have no idea; there is a very slight slope to the edge of the draw. My father's house from the middle thread of the channel going down the coulee, across country, is maybe 200 feet,—I don't believe it is that much. The barn from the thread of the coulee is about the same,—maybe a little more; about 400 feet between the house and the barn, and the coulee running right between. There was not a bit of water got in the barn. As to the depth of the water running down that coulee that morning, will say that the bridge, I believe, that runs between the house and the barn is maybe four or

(Testimony of (Miss) Edith Jones.)

five feet from the bottom of the stream, and it was maybe two or it wasn't over two [369] and a half feet above the bridge. At no place there was the water more than seven feet deep that morning between the house and the barn. There was none of my father's cattle or anything of his that was washed away.

Q. What plows or wire fences or great pieces of machinery, or anything like that was washed away at your father's place, from this draw?

A. There is a hog yard just to the north of our house and it is across the draw and there was wooden panels across the draw to close the place that the draw made and there was wire that run across the road; that was in the same coulee. As to the width that the creek was when I first saw it that morning, I believe it was about as much as it could be without overflowing its banks—breaking loose from its banks.

Q. It was running level with its bank—like the time Cassius invited Julius Caesar to take a swim?

A. It is Greek to me.

The next coulee to the north from the house, there wasn't near as much water coming down there that morning when I saw it, because it doesn't drain near as large a territory. That water too had fallen the night before. That wasn't the one that I crossed with the water fairly well up on the mare's flanks; the one that I crossed that it was up on my saddle horse's flanks was north of the house that crossed

(Testimony of (Miss) Edith Jones.)

the lanes; it runs between our place and Mr. Sletten's. As to how close that lane is to the main creek,—the gate posts is set as close to the cut-bank on the edge of the creek as they can be set without pulling up. When I crossed that, it was maybe a little after 4:00.

Q. Was that before you had rescued the cows of Ira Parks'?

A. As I opened the gate, there was no water around me, and after I opened two gates and "threwed them away", the water had surrounded me,—it came from the south. It was over the banks of the creek when I had opened two gates. I don't know how far it had gotten over the banks of the creek, but surrounding this knoll [370] that the gates were on,—that I and the cows were on—was considerable higher than the land around and it had filled the gully that surrounds this knoll. What filled the—what came down the gully—was not partly coming from the east—that was all creek-water that came past me there. There are rises of land around the edges of the creek from that point to where I live—hills between the house and—As to seeing over them—well, to the north and west of our buildings from our house, from the north window or west window you can see the creek when it is bank-full; otherwise, you can just see the banks of the creek.

I have not been a witness in any of these cases before; was not a witness in the case of Heckaman



(Testimony of (Miss) Edith Jones.)

vs. Northern Pacific Railway Company, nor in any of these cases; this is the first time I have been a witness. I don't remember exactly what day it was that I first told my account of this to some representative of the railway, but it was about two weeks ago Mr. Sheehan asked me if I would come down here. I wasn't working right then. I had never discussed it with any railway employee before; I have discussed it with different people around Wibaux there. I have talked about it to my mother and neighbors,—the neighbors Mr. and Mrs. Lawrence. Mr. and Mrs. Lawrence are not here; I have an idea they are in Wibaux or on their farm directly south of Wibaux. It was a common occurrence to discuss it with most anyone else. Roy Sletten,—I believe I first talked to him about it the morning of the 8th of June, 1929. I don't know as I had told him all I had seen, but we discussed the flood in general. About these walls of water, I have an idea I talked to him about it, the same as anybody else. As to others that I talked with about it soon after June 7, 1929, I talked about it with Ed. Parker's boy, Gene,—and Cyril Parker. I wouldn't say when I talked with him about—about what I had seen,—but directly after the flood, within a few days. I told them about having seen a wall of water. I don't know as I [371] told them the course it had taken; we was merely discussing the topic. I told them I had been in the Davis Addition rather early in the

(Testimony of (Miss) Edith Jones.)

morning of that day and what I had seen there. I discussed it with lots of people, but I don't remember now who they are or what I said to them.

Mr. MAURY: Is Mr. Sheehan here? Will you stand up? Is that the gentleman that you discussed it with about two weeks ago?

A. Yes, sir.

Q. Handsome fellow! Where did you discuss it with him?

A. We were standing in the hall of the Cannon Hotel at Glendive.

Q. And you told him about the flood, or did he ask you?

A. I told him; he had spoke to my brother, Owen, a few nights before that. My brother, Owen, I believe is 27 years old, I am not sure. He was out attending to the cattle that morning. He was not out on that trip to Wibaux; I was alone; he didn't ride with me that day.

When I got down to Wibaux and to the Davis Addition, if I did see Mrs. O'Keefe, I don't remember it; I remember seeing her sometime during the forenoon but not when I first got there. When I saw her first, I believe she was—I wouldn't make a definite statement—but I believe she was to the south end of the Davis Addition. That was almost where everybody was gathered that were in the Davis Addition in the water district; some in Mrs. Hayes' house; some sitting in their car, and moving around generally. When I got there where Mrs.

(Testimony of (Miss) Edith Jones.)

O'Keefe was, Mr. and Mrs. Sletten were there, and Mr. and Mrs. Hayes; I don't know about Mr. Hayes, but Mrs. Hayes was there, and Mrs. Lynch.

Q. Did you tell them about this approaching wall of water?

A. The water was "doing its worst" when I was talking to them. Mr. Trollope was the first man I seen when I got to town; he is the only one I have a distinct recollection of. He was out to the west of his house. That is his house right there (indicating); he was out here either in the yard or alongside of it. [372]

Q. Mr. Trollope's house is on the east side of Beaver Street and on the north side of Olive Street?

A. He is on the north side of Olive Street and it is the corner house. As to how many houses were then between his house and the bank of the stream, looking towards the Mattie Miller house, there was Mr. Sletten's and what now belongs to Mrs. Woods, and the Pollock house. I did not go with Mr. Trollope; I went alone, north. I "ended up" about half way down the wooden foot bridge. I don't know what Mr. Trollope was doing when I first saw him,—I was excited. Almost anybody would be excited to see that much water come down Beaver. There was a great deal of water coming down Beaver Creek when I was talking with Mr. Trollope—more than I had ever seen coming down before; that is what made me excited. I saw more opposite my house in 1921 than in 1929 when I first saw it.



(Testimony of (Miss) Edith Jones.)

Q. The additional water had come down these three draws——

A. It filled the bank between the barn and the house in 1921, that was filled full.

Q. I am talking about 1929 now. This additional water to the main creek had come down the coulee right south of your house?

A. Well, all of the coulees emptied into the creek. It had come down those three coulees, as you understand.

Q. Because, when you first saw the creek that morning, as you were able to tell us, the water in the main creek was not so high as you had seen it in 1921?

A. I wouldn't say that exactly. I have no distinct recollection of the water in the creek in 1921. I know the water was high; I saw it, but I don't know just how high.

Q. Refreshing your memory with your testimony given about an hour ago, did you not answer this morning to Mr. McCarthy, that the water that you saw when you first got up, in the creek on June 7, 1929, was not so high as you had seen it in 1921?

A. Well, undoubtedly, it wasn't quite as high as in 1921, because I know it overflowed the bank in some places in 1921, and it had not [373] overflowed the bank when I first saw it that morning.

Q. And it would be your best calculation that the additional water which resulted in a wall, came down these three coulees?

(Testimony of (Miss) Edith Jones.)

A. No, sir. It came from the south some place, absolutely,—some distance south of our place altogether. It came from some place from the south,—I don't know where it came from. It undoubtedly came past Clem Parker's place. It did not come from those three coulees—not the wall of water—did not come from those three coulees. It must have come by Clem Parker's place—it would have had to. Because there was no rain falling between the time that I first saw the main creek that morning and the time that the water went down in Wibaux; and I would think that it must have come from the region of Brophy's place, or south of there. I wouldn't say where it originated because it was beyond my line of vision. I first saw it to the north of Clem Parker's place, because there is a bend in the creek and it spread over this bend. \*

Q. When you first saw it, how high was it above the level of the main stream in front of you and between the banks?

A. I don't know how high the banks are there, but there are steep banks——

Q. We are not getting at the height of the banks, but the height of the wall of water between the banks. How high would you say it was when you first saw it, from the top of the wall down to the water inside?

A. It was  $3\frac{1}{2}$  feet or 3 feet 8 inches. The top of the wall was above the banks. As to the height of the wall at the edge of the banks, well, it spread

(Testimony of (Miss) Edith Jones.)

out over the banks for quite a ways. It spread out from the stream where it possibly could; it spread out as water naturally will. As to how deep the wall of water was over the banks when I first saw it, maybe after it spread out, there was two foot—two feet over the banks in places; maybe some places higher than that. As to how deep the wall of water was just over the banks, as it [374] proceeded down through the valley, it would have to be mere guesswork to say anything like that.

Q. I know. That is what we want; we want the best kind of guesswork.

A. Because, some places water would extend out to a great extent and naturally, it was somewhat lower where it was compressed in between banks.

Q. How much lower where you saw it over the banks from Parker's place?

A. It must have been some lower, because the ground was higher up there. There are sloughs to the west of Parker's place, I don't know as west of his house, but to the north and west of his house there are. Those sloughs take in quite a good territory; they take in quite a bit of pasture there. The water passed over those sloughs.

Q. Did you see any of Mr. Parker's sheep?

A. I don't know if I saw any of his cattle. I don't know whether the water got into Mr. Parker's house. I don't know whether Mr. Parker's house is on the same bench as Mr. Burke's house, or not; Mr. Burke's house may be lower, I wouldn't say to that. I know Mr. Massey's house. As to whether



(Testimony of (Miss) Edith Jones.)

all three of those are on the same bench of the river, will say that I believe Mr. Massey's house is a little the highest; Mr. Burke's is lower than Mr. Massey's; and Mr. Parker's, further to the south than Mr. Burke's, is possibly a little higher than Mr. Burke's.

I don't know what became of the county bridge up near Mr. Brophy's place. I would say that that bridge was not washed out in the flood of June 7, 1929, because people used to go past our place to this bridge, to go to the west side of the creek. I have crossed that bridge by Brophy's, but not often. It is a familiar sight to me. It is not standing there just the same as it was standing before June 7, 1929,—well, it is the same bridge. It is a wooden bridge; I wouldn't swear to that, but I think it is a wooden bridge; I think it has always been a wooden bridge to [375] the north of Brophy's place—between our place and Brophy's. Pointing out (on defendant's exhibit Y-13) my father's place—the one that I started from that morning,—this is north? We live on the southeast corner of 24, township 14, range 59.

Mr. McCARTHY: Write in the full name "Jones".

A. It is not big enough to write "Jones".

The creek bends around quite a few places; it runs in a northerly direction. The map here shows the bending of the creek at our place; I believe that would go through what land we have there now.

(Testimony of (Miss) Edith Jones.)

This bend might have been half a mile from my father's house. Directly at our place there are not very long meanders on both sides east and west, of the general course of the stream.

Q. Well, right opposite your place?

A. But north of our place, the creek does a great deal of winding. Between our place and Wibaux, the creek makes long crooks or meanders; in fact, it makes two exceptionally long meanders to the west.

I heard one airplane real early that morning; there was one went over early in the forenoon; one crossed in the afternoon and I believe I didn't have any recollection of any others. As to where I was when the first airplane went over,—the one that went over real early in the morning, it might have been what woke me up in the morning; it was real early in the morning, I don't know, I don't remember whether I was up or not when that airplane went over, I remember it going over, but I don't remember just when it went over. When the second airplane was observed, I was in the south end of the Davis Addition. I had been there—I might have been there quite a while, I don't remember,—about an hour and a half,—maybe more, maybe less. About the length of time I had been there, it is merely guess-work; I paid no attention to the time that morning. I don't remember who I was standing with when that second airplane went over; there were so many people around there,—I mingled

(Testimony of (Miss) Edith Jones.)

with them all. When the county bridge at Wibaux [376] went out, I was between Mr. Trollope's house and the Davis part—As to who I was talking to,—you are assuming that I was talking—I suppose that I was, I usually do, but I don't know, there was probably a number around there that I was talking to, but maybe I was just talking to one. I remember Mr. Trollope was there; he is the only man I have distinct memory of that day,—him and Mr. Sletten.

I have not been sitting here during this trial. I have heard none of the Wibaux witnesses, only the surveyors; that was the first I remember, when the surveyors were up here.

What I spoke of going out was not a "little" yellow house; it was a pretty good-sized house; it was brown. That was the house by the water tower. It washed down near the railroad bridge. I don't know what course it took—where it went, but the first place I saw it, it was from near the intersection of two streets there. On the model, I don't know exactly where it was when it lifted up; there (indicating on model) is the water tower; that (indicating) represents the house; it may have been a little this way. I am now indicating the house between the two long lines of the dyke there,—I believe it was a little more this way. I don't remember where, the course that it took,—but in through here (indicating); it was along there some place when I first saw it. It went down the swale. When I first saw it, it was in here,—when I first saw it after



(Testimony of (Miss) Edith Jones.)

it left its foundation. Then, it was along on this street near this house, I remember that. I saw the Methodist parsonage go out; that started from west of the church there. It went out into the street and it turned into the east and down by the blacksmith shop and down back through here and on down. I don't say as to whether the county bridge had gone out then, I don't remember. As to how long it took the parsonage to get from where I knew it was standing on its foundation, out into the main channel of the stream, will say,—as [377] fast as things were happening that morning, and the way it seemed to me, it probably took it a while, but still, it wasn't over a few minutes,—I don't know. It seemed like it took it an awfully long time to go down the stream and land on the railway bank.

Q. By “awfully long time”, would you say 20 minutes?

A. Maybe half an hour, or anything less than an hour. I didn't see any barrel floating in that stream that morning. I noticed people moving from north to south out of houses,—out of the Davis Addition I did. It was directly after I got to town that they started moving from north to south on the Davis Addition,—just shortly after I got there. People that I knew that were moving from north to south in the Davis Addition, were—Mr. Sletten and his wife moved out. Their house is that large square house just south of Mr. Ostby's,—this house

(Testimony of (Miss) Edith Jones.)

you are pointing out. They weren't moving when I got there; it couldn't have been very long after I got there that they started moving, I would say it might have been half an hour,—it might have been over; I don't believe it was an hour before they moved out. I have an idea that it was around 6:30 o'clock that they started moving from north to south. Other people that I saw moving that morning from north to south,—Mrs. Lynch moved her children out of her house; it is the Baird house—it is south of Sletten's—not directly across the street, it is this house right here (indicating); that is right west of the word "Beaver". Mrs. Lynch started moving out quite a bit after the Slettens moved out, maybe 15 or 20 minutes. I don't believe I seen anybody moving their things, only their personal belongings. I don't remember whether I seen Ostby that morning; if I did, I forgot it. These people moved that morning to what I call the south end of the Davis Addition; it is a road that runs east and west along the south side of the Davis Addition; that is a road going to the west and up to Massey's place. The [378] majority of them didn't move to this high land here, but they were generally along the road. All of them didn't move out of the Davis Addition. In regard to who, and what residences, still remained occupied in the Davis Addition, Allie Meeks lived in the Betten-dorff house; I believe that (indicating) is the Bet-tendorff house, and all remained in there but one

(Testimony of (Miss) Edith Jones.)

boy. I don't believe the water entered the floor of that house on June 7, 1929; I believe it entered the basement, I believe it was—it must have been. That is all the name I know—"Bettendorff house", and as to what time water got close to that house, or around that house in 1929, will say it was before 7:30,—between 7:30 and 9:00; time didn't mean much to me that day. The best time I could give you that the people started moving from the north to the south in the Davis Addition that morning, is around 6:30.

I spoke to Mr. Parks shortly after about having rescued his milk cows; I don't know how soon it was after; it was before the talk of the flood died down around there. I was well acquainted with Mr. Ira Parks. When he first knew me I was two or three years old; he is one of the first of the people I have any recollection of.

Q. Would you say that when that wave or wall of water reached the top of the swale as we call it, that it came towards the east or went down the swale, which?

A. Well, it seemed to divide more or less, it bumped into the buildings, the majority of it I believe, went to the east,—the greatest speed,—towards the county highway bridge; not directly east, but it came in a general easterly direction.

Q. Just name the place where you think it divided or split, one part went east and one part went north down the swale?



(Testimony of (Miss) Edith Jones.)

A. No definite—As to whether it was some place in the district of the water tower,—it parted for the others, there is other structures, a series of them. I did not see it actually lift the yellow [379] building; I didn't see the yellow building until it was down on this E Street, whatever it is called; I didn't see it lift up. It was still floating when I saw it; it was partially buried in the water; it was heavy, it sunk to some extent. I don't know as it sunk down that far—like the Methodist parsonage that sunk almost to the roof—I remember seeing it, but I don't remember how much of it was covered with water.

It was before noon, I believe, that the water commenced to recede or go down, in Wibaux. It went down quite rapidly.

Q. By “quite rapidly”, how much in time before it commenced to fall in this section of town—not until the streets were dry, because there was mud—but until men in heavy overshoes could walk up and down Main Street?

A. Well, the time is all connected with incidents with me.

Q. Surely. What would you say was the time it first commenced to fall until men could walk around there in six or eight inches of slush and debris and mud,—that an hour elapsed?

A. It was an hour, possibly more I believe; possibly it was more. That much water couldn't have gone down, it don't seem to me, in that length

(Testimony of (Miss) Edith Jones.)

of time. \* It did not. It was quite late that afternoon before I crossed to the business district of the town. Of course, other people went before, but it would be just safe that it would be going into the business district. I heard people explain that "the water is going down"; it was a general expression around there; they were all watching it, absolutely. As to how long after that time it took before people could walk up and down Main Street, will say that it was 3:00 or after before I went up Main Street. I got there by walking across what was left of the railroad trestle.

Q. The rails and ties were still standing?

A. The rails were still there.

Q. I mean the bridge.

A. It might have been a bridge, but it [380] didn't look like much of a bridge to me. I don't know whether there was a bridge standing when I walked across that afternoon; I don't know whether it was there or not; I know the railroad trestle was sagging terribly. It seems if the bridge was there, it wouldn't have been.

Q. Can you have any independent recollection at this time as to whether when you walked across on the railroad track over into the main section of town that afternoon about 3:00 o'clock, whether the bridge—the girders—the iron portion of the bridge was standing on the concrete work underneath or not? Do you recall? Have you any recollection of that?

(Testimony of (Miss) Edith Jones.)

A. All I remember is the ties and rails that I walked on; I was "pretty busy" walking across it when I crossed it. If the bridge was washed out, it was washed out before 3:00 o'clock.

Q. Do you have any memory now or not, as to whether that bridge was washed out or not?

A. I never paid much attention to it after I crossed back that afternoon.

Q. Could you find some witness that could tell us whether or not that bridge was standing that afternoon?

Mr. McCARTHY: That is objected to——

Mr. MAURY: We understand, it is embarrassing.

Mr. McCARTHY: It is not embarrassing to anybody but you.

I got back sometime that afternoon. I got back by walking across planks that had been laid across the ties on the railroad bridge. In town, that afternoon, everybody was talking to everybody else. The mud on Main Street was too deep to walk in in comfort; six to eight inches, probably a foot in some places.

I tied my horse way over on the south of Possum Hollow, way over by the outskirts of town. I rode my horse home. She was waiting for me where I turned her loose. It was late that afternoon when I got home.

There were three walls of water that I remember distinctly. [381] They were quite a ways apart, still



(Testimony of (Miss) Edith Jones.)

they weren't no mile or anything like that; they all easily fitted into about a quarter of a mile.

Q. All about the same height? Did they look like twins or triplets?

A. No, sir, not to me.

Q. Which appeared to be the oldest?

A. Well, the water in the front came first. It probably originated it. That one was maybe 3 foot 6 inches or 3 foot 8 inches high.

Q. Now, the next one, how tall was he, or she? I believe they call those things "she" up in that country?

A. Well, it might have been higher; I believe it seemed to be a little bit higher, but it was more of a continuous wave; it wasn't boiling and rolling like the first one. The third one was smaller than the other two.

Q. How would you say that compared in size with "number 1",—as a Fox Terrier compares with a Saint Bernard, or how?

Mr. McCARTHY: Now, if the court please, I think we have gone over enough things without going into the breed of dogs.

The COURT: Sustain the objection.

## FRANK MIESOLOSKI,

recalled for re-direct examination by Mr. McCarthy, testified:

If I remember, I went four or five times down to look at the creek before going to bed on the night of June 6th. It was pretty late when I went down the last time, I think between 10:00 and 11:00 o'clock. The water at that time was probably a foot below the high banks of the creek; it was still within the creek bed, and it was on a level within just about a foot of the top of the bank,—maybe eight inches,—pretty close, and ready to overflow. [382]

## Cross Examination by Mr. Maury:

I told you about that before; I think if you ask me, I tell them. I don't think this is the first time I ever told about that in court; I think I said it before, didn't I? I tell you why I went down to look at it four or five times that night: week before that, I dreamed that this water was coming. I didn't dream that Wibaux was going to be flooded—no, no. There was about few days before I had dream; there was water coming and I was trying to protect family with the car and go away——

Mr. McCARTHY: If the court please, I think we are going too far——

Mr. MAURY: It goes to the credibility of this witness.

The COURT: Yes, I think so. It is for the jury to say as to the credibility of this witness. \* Is

(Testimony of J. D. Cullen.)

there anything further you want to cross examine this witness about?

Mr. MAURY: No.

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J. D. CULLEN,

called as a witness in behalf of the defendant,  
testified:

Direct Examination:

(By Mr. McCarthy).

Reference was made here with reference to my crossing Wibaux Street in the vicinity of Orgain Avenue on the morning of June 7th, and that I had in my hand at the time a neckyoke. I am the same man; I crossed that street with a neckyoke.

Q. Mr. Cullen, what have you to say with reference to there being water on Wibaux Street at that time, between the viaduct and up to First Avenue South? Whether water was running on Wibaux Street from First Avenue South?

A. It was coming down Wibaux Street towards the viaduct. It was coming south of the lumber yard that I managed at that time, going around and down towards the viaduct. [383] It was going through the viaduct from both—the lumber yard is on the right-of-way; it was going on both sides of the lumber yard into the viaduct, coming from the east and also from the swale on the west side of town, that was half way up there, coming down



(Testimony of J. D. Cullen.)

the south side of the track and then going through the viaduct. I could feel an effect of the current of the water on my legs when I was crossing Wibaux Street there at that time. The tendency of the water—the water was heading for the viaduct; it is down the street—downhill.

**Cross Examination:**

(By Mr. Colton).

Early in the morning I went down to my lumber yard; it was situated right here (indicating). I didn't say the water was coming from the "bridge"; I said it was coming from the creek and going west south of the lumber yard—by the lumber yard—to the viaduct, and at the same time, water was coming from north of the swale over here, east towards the viaduct. As to whether at that time there was any water on Main Street between the intersection of Wibaux Street and First Avenue South and down to the intersection of Orgain Avenue, will say when I watched that in the street, the water was catching me with these laced boots, I should judge 16 inches deep in the middle of Wibaux Street.

Q. What time did you go to the lumber yard first, right here?

Mr. McCARTHY: Objected to, not proper cross examination.

The COURT: Of course, he hasn't gone into that. You can examine him to test his recollection about it.

(Testimony of J. D. Cullen.)

I got to the lumber yard between half past 5:00 and 6:00. There was no water on Main Street at that time and there was no water going through the viaduct at that time; I don't know what time the water started going through the viaduct, well, I would say about 20 minutes after,—about 6:00 o'clock I would say. Like some of the witnesses, I wasn't paying much attention to time, [384] but I would say it was a quarter after 7:00 when I started from the lumber yard with the neckyoke, to get out of there towards Main Street, and as I progressed from the lumber yard right here, up towards Pickering's pool hall, or between Pickering's pool hall and the Orgain store here, the water was attempting to pull me towards the viaduct, but I was going the other way.

Q. Now, when you got past the intersection of Orgain and Wibaux Streets, was the current as strong going north on Wibaux Street as it was going north, at the intersection of Orgain and Wibaux Streets and the lumber yard?

A. I would like to answer that my own way: well, the current at the door—that lumber yard represented there is 20 feet back from Main Street. The water coming up Orgain Avenue, coming west there, was rushing by the door, and there is a big window in the south—I could see out through there, and it was coming up through against the building and down past the corner and towards the viaduct. I couldn't trust myself to step out in that

(Testimony of J. D. Cullen.)

current (I am past 21), and when I got to the middle of the street, I told the two men helping me, I says, "Go ahead boys, I can take care of myself." Out there, it wasn't as strong.

### Redirect Examination:

When I walked up to the pool hall, to the building I got on top of, there was water on Main Street at that time. I would say it was 16 inches deep at the time they left me at the intersection of Orgain and Wibaux Streets. If you are talking about Wibaux—Main Street, between the building I got up on and the Pickering pool hall, there was water on Main Street or Wibaux Street at that time. The Pickering pool hall is at the corner of Orgain and Wibaux Streets, northeast corner of the block,—it would be the southwest corner of the intersection. The building I got up on top of was located on the west side of Wibaux Street, and about three-fourths of the way between Orgain Avenue and [385] First Avenue South—the second building from the south end—The building at the intersection of First Avenue South and Main Street, at the northwest corner, is the Sawyer store, and the building next to it is the building I finally landed on top of; that is the small building immediately to the north of the Sawyer building—at that time. The building has since burned down. The open space immediately to the north of the Sawyer store shows where the building was that I got up on—



(Testimony of J. D. Cullen.)

where it is—the one I got onto had been removed; I went up on one building and over to another. As I walked south on Wibaux Street from the Pickering pool hall to get to the building I finally got up on, there was water on Main Street at that time. As to how deep it was—what the length of time was I started to tell. It started out 16 inches when the boys left me at the intersection of Orgain and Wibaux Streets; before I could get to the building I got on top of, the water was catching me up here perhaps 14 inches higher than it was before I started. That water I encountered after leaving the Pickering pool hall was going north towards the viaduct.

Recross Examination:

I didn't see any wall of water coming down that morning over the town of Wibaux,—that is as I saw.

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EDWARD SHERMAN BAER,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My full name is Edward Sherman Baer. I live at Streator, Illinois. My business at the present time is civil engineering and superintending of brick factory and sewer pipe factory. I studied engineering in the University of Wisconsin.

(Testimony of Edward Sherman Baer.)

I held an official position in the State of Montana in the [386] year 1907; I was County Surveyor of Dawson County. At that time, Dawson County embraced the Town of Wibaux. I was ordered or directed by the Board of County Commissioners of Dawson County to prepare plans for a highway bridge across the creek at Wibaux. That was the first bridge that was put in there to my knowledge—the first bridge that went in. As to whether I complied with the order and designed a bridge, will say that I wrote out general specifications for the length of span for a steel bridge to be built on concrete abutments. The bridge was built. In regard to how many years that same bridge I designed stood there, will say that I wasn't there when it went out; I understand it went out in June, 1929. It was there from December, 1907, until the time it went out. As to what study I had made of water conditions that that bridge would have to meet before I made my specifications for the bridge,—how I determined how big a bridge I would want,—I inquired at Wibaux as to the high-water marks and I was directed to Mr. Tommy Rush who lived in the Massey place. I went up to his house and he showed me the highest mark he seen at the creek. I drove stakes, cross-sectioned the creek, and determined the fall, and computed the cross-section, and designed a bridge capable of taking care of any water in the creek that came down in Wibaux

(Testimony of Edward Sherman Baer.)

prior to that time. I have refreshed my recollection as to the plans of the bridge since that time.

It was testified to here yesterday that the area under the bridge for water was 920 square feet; that is practically correct. \* I did not make plans for any spillway for any water east or west of the county bridge. I was familiar with the railroad bridge that was in place at that time.

Q. It was testified to here yesterday that the waterway under the railway bridge was 1190 square feet (we will contend it was somewhat larger), but assuming it was 1190 square feet of waterway under the railway bridge, why did you provide 920 under the county [387] bridge?

A. Mine provided a cross section sufficient to take care of Beaver Creek proper. It is evident from the cross section which was taken at the Massey place. Applying my knowledge of engineering to the situation, I designed a bridge that was considered ample and adequate.

#### Cross Examination:

(By Mr. Maury).

Q. There was a spillway to the east of your bridge, was there not?

A. There was a road that led to Beach, which was lower ground, yes. I think there was lower ground for 700 or 800 feet there. I never ran levels across there to determine how much lower that ground was than the floor of my bridge. We



(Testimony of Edward Sherman Baer.)

were asked to build the floor of that bridge level with the intersection of First Avenue South and Wibaux Street. I guess there isn't much change now. As to whether that was filled ground, will state that I think the whole townsite of Wibaux was made-ground.

Q. Have you anything here that shows the outlines of your bridge?

A. Yes, sir. \* I haven't those plans. I didn't help to prepare this plan (having been shown defendant's exhibit Y-4). I have looked it over before. To the best of my knowledge, it is correct. Under my bridge there is practically an area of 920 square feet.

Q. Does that include the little triangle in the bottom or not?

A. It included a complete cross section of what was there at that time. Whether it included this triangle in the bottom,—I don't recall just what it included and I don't recall that the area was the same as the specified bridge, but I do recall that it was what was supposed to be there. I do not know, I am sure, whether there was an area of 2230 feet left for water to flow over that land to the east of my bridge. There was a large area there.

Q. Always there? Were there any buildings when you placed the county bridge in the region here of this sidewalk? Have there [388] ever been so far as you know?

A. I don't think there were any there when the bridge was——

(Testimony of Edward Sherman Baer.)

Q. No. You never saw any.

A. The elevators were there though, however. I don't remember the location of this elevator, whether it was on the east side of the railway or not; I remember driving by and——

I don't know a thing about flood conditions after 1907 there, except what I have heard here in court and at Baker. I built the bridge and my duties were completed. I left Montana in 1914. I was last in Wibaux in 1914 on business. I have been there in the last year, since this case came up. I don't know anything about flood conditions after the bridge was built.

Redirect Examination:

Q. Mr. Baer, what have you to say with reference to the Board of County Commissioners having plans for a road running to the east of the county bridge at the time you designed the bridge?

Mr. MAURY: Objected to as not material. The plans themselves, if they were actually in existence and written down, they might be shown here. Too indefinite; too remote. It might be in the mind of the county commissioners or in the mind of somebody else.

The COURT: If he has any distinct recollection of what he did or what he was instructed to do.

Q. With the qualifications suggested by the Court, will you answer the question?

A. I believe that First Avenue South was opened at that time. I believe the County of Dawson bought a right-of-way across there for First Avenue South,

(Testimony of Edward Sherman Baer.)

and paid something for a right-of-way, and I know it was the intention to build a road across there, to the east. In building the road, of course the road would run both sides of the county bridge; it had to cross the county bridge. That road, I presume it was to go to the end—to the county line, which was at Yates, or some place there. [389]

Recross Examination:

Later on, I think they did build a road across there. I don't know whether or not they built it some 8 feet below the floor of my bridge. As to whether they built the road lower for a distance of 800 or 900 feet, will say that I examined the profile relative to the bridge,—not relative to the road, and I don't know anything about it.

Q. They did build the road for 800 or 900 feet much lower than the floor of your bridge?

A. That may go in the record as your testimony—not mine.

Q. You are an engineer. Now, if exhibit Y-4 is correct, Mr. Baer, the county did build a road for a distance of 700 or 800 feet, below the level of the floor of your bridge?

A. If the profile is correct as exhibited, the profile shows that condition.

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JAMES C. STARK,

being first duly sworn as a witness in behalf of the defendant, testified:



(Testimony of James C. Stark.)

Direct Examination:

(By Mr. Hall).

My name is James C. Stark. I live at Mandan, North Dakota. My business or profession is civil engineering. I graduated as a civil engineer in 1923; have been practicing my profession ever since.

On June 6th and 7th, 1929—or on June 6th, 1929—I was working in Beach, North Dakota. That is about 10 or 15 miles east of Wibaux, Montana. I had occasion on the 6th,—or the 7th of June—to make a trip to Wibaux.

Q. How did you come to make that trip, and on which day?

A. Oh, hearing about the flood conditions in Wibaux, we went over to see the sights. We went by car—automobile. We arrived in Wibaux between 1:00 and 2:00 o'clock in the afternoon. We stopped our car east of the elevators, on the high ground. [390] We couldn't go on into town on account of the water. I got out of the car and stood there and took a general view of the surrounding country west of us, and we walked over to the Northern Pacific railroad track and down along the railroad track to the first washout; the first washout was east of the bridge. At that place it was washed out underneath the track; the track was suspended in the air; it was held up by the bolts. I didn't cross over that and go on into town. When I got to just east of the bridge and as to whether I observed the extent of the water in Beaver Creek at that time,—well, as far as you

(Testimony of James C. Stark.)

could see was water. Looking along the railway track, the distance east that the water extended then,—east, it was across those tracks leading down into the elevators—water still over the elevator track. Looking south of the depot or the right-of-way, it extended west as far as the high ground on the west. So that whole country was covered with water at that time. The piers and the abutments of the bridge were standing. As to whether or not any of the embankment had been washed out on either side of the abutments at that time, will say that east of the pier had washed out about 100 feet. I would say there was less than 100 feet of the embankment washed out to the west,—about 75 feet, so at the time I got there at 3:00 in the afternoon, there was 100 feet washed out on the east side and 75 feet on the west. From where I was I couldn't see so that I could tell whether any had been washed out at the viaduct at that time. As the water flowed through there where the embankment had washed on either side of the bridge it had the appearance of going over a falls or rapids.

Defendant's exhibit Y-29 represents a scene that I saw there while standing on the bridge, from the position where I was standing east on the embankment, east of the bridge, and looking southwest towards the water tower; it represents a picture with the camera up here (indicating on model) somewhere. [391]

Mr. HALL: We offer that (Y-29\*).

Mr. MAURY: No objection.

(Testimony of James C. Stark.)

The camera was at the lefthand side of this (pointing on model) facing from some point on the railroad embankment over towards the water tower, and that shows the suspended rails between the embankments where it had washed out 100 feet west over towards the bridge; I said it was something like a waterfall or cataract from here over to the abutment. I couldn't tell what it was that caused that drop in the water at that time.

I was back there again the next day, after the water went down. With reference to whether defendant's exhibit Y-30 correctly shows the condition of the washout under the track east of the bridge, these underpinning went out, but so far as the track is concerned, and the ground, it is the same thing.

Mr. HALL: We offer that (Y-30).

The rock alongside the embankment there is what gave the water this appearance as in Y-29, my attention having been called to exhibit Y-30.

Q. The rock underneath the track there. When the bank washed out this picture shows it did not wash down to the level of the stream and the water went over the bank like a fall?

A. Yes.

Mr. MAURY: Objected to as leading.

The COURT: Yes, it is leading. But he has gone over that; he testified to it once.

Y-28 represents the condition of the track west of the bridge, except that some supports are out.

Mr. HALL: We offer that (Y-28) in evidence.

Mr. MAURY: No objection.



(Testimony of James C. Stark.)

As to the condition of the rock underneath the track, that picture shows rock that is there left on the south side of the railroad track, underneath the suspended track. On water flowing from the south to the north that would give it a waterfall or rapids effect [392] in there.

I stated that on the 7th I didn't attempt to cross over the suspended rails; people did go over,—there was quite a few passed over it. I don't know whether or not the rails were suspended over the viaduct. I stated I was there the next day; they were still suspended. I couldn't exactly locate the viaduct from where I was standing on the 7th, but there was people down the track as far as I could see; there were lots of people on the track there by the depot. I said I got there between 1:00 and 2:00 on the 7th. I was there three hours I imagine. When I left the water was going down; it was gone down considerable before I left. As to what the condition of the ground was at the time I left there—say from the spur track over to the lumber yard—there was still water in the spur track for the lumber yard, but it had gone down some from the time I first came.

Cross Examination:

(By Mr. Maury).

I didn't take these pictures; that were just shown me; I just looked at them. I said I didn't know why that on exhibit Y-29 had the appearance of a waterfall. I wasn't familiar with the country; I

(Testimony of James C. Stark.)

didn't know what was underneath there. I imagine there was about a foot and a half difference in water level elevation between the north and south side when I first saw it. As to whether the drop occurred right at the fill, will say that just as soon as it passed that rough edge, it dropped right down and went out in normal condition again. At that time, I did not know what caused it; the next day I seen what caused it; that rock on that embankment there caused it.

Q. The rock? Now, a back-up of water could cause it, couldn't it?

Mr. McCARTHY: Objected to as speculative, if the Court please.

The COURT: You may inquire whether backing up of water [393] might have caused it. He is qualified as an expert.

Q. Would it have caused it?

A. No. Under those conditions, it wouldn't.

Q. Would the backing up of water there at the bridge and the fill, where it was too narrow to hold the water, cause it?

A. The water wouldn't drop off all of a sudden and flow off just normally—not off a place like that.

Q. Not when it was down to about nothing, would it Stark? When the difference in elevation was approaching nothing, Mr. Stark?

A. The water was going down, but there was water there every place you could see around the town.

(Testimony of James C. Stark.)

I didn't measure the break-out or the break-down of the fill on the east side; I am simply giving an estimate. I didn't measure on the west side. I didn't get there before either one of them was gone; I think they were both completely gone before I arrived. I just seen this picture Y-29 here a few minutes ago; it was longer than three years afterwards. The first time after that that I saw this picture was—1929?—this is 1934; that is this year. That was the first time I saw it. This represents the scene just as I saw it—just as I got there—just as I saw it first.

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ANDREW PAULSON,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. Hall).

My name is Andrew Paulson. I live in Wibaux, and have been since 1911. I am an auto mechanic at the Wibaux Machine and Auto Company. I was in Wibaux in 1921 when they had some high water. In 1921 I lived southeast of the water tank, up at one of these houses. That is the Kinney house you are pointing to; anyway, I lived in a house there close to the water tank; this is the house I lived in—the first house west of the Kinney house toward the [394] water tower. There was another



(Testimony of Andrew Paulson.)

house close there, what we call the yellow house. That was right southwest of my house; that would be down this way. The water didn't get into my house in 1921. I couldn't say, I don't know, whether it got into the yellow house there. I think the yellow house was slightly lower than my house, I couldn't say how much,—maybe a couple feet, maybe not that much.

I was also in Wibaux in 1929. At that time I lived west of Drake's store. This (indicating) is my house right here, on the northwest corner of the block, lying south of First Avenue South and west of Wibaux Street. On the morning of June 7, 1929, at my usual time, I woke up about half past 5:00 and started the fire, put the coffee on, then back to bed and laid down a while again. I got up about 15 after 6:00 and got ready for breakfast, and after I got washed, then I heard the water splash and I didn't pay much attention to it, I thought it was just a team going by on the street; then the Mrs. looked out the door and she says, "Look at all the water in the yard," and about that time Sam Austin came along and he says, "You better get out; the creek is coming up,"—at least I thought that is what he said. So I went outside and looked to see what it was, and the Mrs. come out, and we looked up the creek and just then, we seen the yellow house lift off its foundation and it seemed like it just stopped in that block. As to whether it stopped between my house and

(Testimony of Andrew Paulson.)

the barn, will say it stopped right in here (indicating). There is a sidewalk there and it ran up against that and that is the last we seen of the house, and we went in the house and was going to get the kids and get out, but before we got the kids ready—well, I don't know what time it was then—but when I got out and was trying to get across,—and I had the kids all ready,—and was trying to get across, I stepped out and the water reached me about up to here (indicating to the top of his coat [395] pocket, right under his arm). I should judge that was about four feet. I stepped out the door the east side of my house; that would be towards Wibaux Street. I had four children to get ready and I stepped out with one of the children. There used to be a sidewalk there at the east door, but it floated away; that wasn't there when I stepped out. That is the reason I went down in the water so deep. That water was flowing north. Then, after I found it was so deep there,—well, I seen I couldn't get across; there was no way to get out of there; I might have got out if I had only one child, but I didn't want to leave the rest of them and I went back in the house again. The water was pretty high in the house at that time; it got up over the stove and killed the fire in the stove, and we got up on top of the stove to keep out of it as much as possible. I left the doors of the house open. I left them open because I figured the house wouldn't be so apt to float away. I had a door on the south side and I left the door open on the east side. The water seemed

(Testimony of Andrew Paulson.)

to be flowing into the south door and out the east door. We all got on the stove. Nobody called to rescue us. I had a "visitor"—I had a cow come in the east door of the room and swim out again. The highest the water got was right up to my arms while I was standing on the stove. The children were on the warming closet—on the warming oven on the back of the stove. I think it was half past 1:00 when I got down off of that stove. I said the water was up to my armpits when I was standing on the stove—just about four feet, something like that. I observed the water on E Street; E Street runs north and south, that is just west of my building. I observed the water on that street—well, as long as we could see it. That water was flowing north, I couldn't say how fast. I had a watch that morning; it stopped at 12 minutes past 7:00. I figured my watch stopped when I stepped off the porch that first time,—when I stepped off on the east side there. It is [396] the watch I got here now.

Cross Examination:

(By Mr. Colton).

I couldn't say how deep the water was in the swale,—I wasn't in the swale. This building I was in was a wooden building. When I stepped out of the door and up to here, the sidewalk that was supposed to be there had been washed away at that time, and I stepped down into the place where the sidewalk usually stood. I didn't hear any rumbling noise of water before I got up; I just heard some-



(Testimony of Andrew Paulson.)

thing like a team walking through the water. When I first got up, nothing unusual attracted my attention, then I slept until 6:15. When I heard water spashing at that time, that was the first indication to me there was any flood. Counsel asked me about the water all moving north. The water was not moving all directions, not by my house it wasn't. After the flood, I did not see any objects that was carried west or carried east. I seen the shingles up by the Catholic church up here, but I didn't see them go up there; I knew they were there after the flood; I presume they were carried there by the flood, I seen them up there. As to whether there was quite a stream of water down to the west of my house, down the swale, will say that it came about the same time—the water in my yard and the water west of my house. That is pretty hard to tell, how much the water rose after my watch stopped,—Well, the water was up to here on me (indicating), and I figured my watch stopped before then, and the water in my house wasn't over my knees at that time and it was that much higher on the outside, so it must have raised from my knees up to here,—I should judge two and a half to three feet maybe. All those houses stood here in 1929, all from the water tower across over here; those houses are mostly frame buildings,—wood,—frame buildings sitting on the ground.

Q. When you first stepped out of your house and water was up to [397] here, the watch stopped?

(Testimony of Andrew Paulson.)

A. You will have to get a watchmaker to tell that,—how long it can run in water; I don't know how long it can run in water. That was the time it stopped—after I stepped out of the house in water trying to get to the sidewalk, and when I stepped out here (the point you have indicated), that was 12 minutes after 7:00.

Redirect Examination:

The first time my watch got wet was when I stepped out of the east side of the house. \* I knew the watch was running before that. I said when I was in the house trying to get my child out, the water was up to my knees on the floor of the house, and I got up on the stove; the stove would be a standard height kitchen stove; and as I say, I then got up on top of the stove, and the height that the water got on my body on the stove, was right under here—under my armpits, and so it was up there and then on the stove. I suppose the stove was around two feet high; it was an ordinary cook stove.

Recross Examination:

It was after my watch stopped that I got on the cook stove. We didn't get on the stove until after the water was over it. As to how much the water raised after I got on the stove, it raised right up to here (indicating).

Mr. McCARTHY: Witness indicating a line from armpit to armpit, which he previously has indicated as being four feet in height.

(Testimony of W. M. Combes.)

Mr. MAURY: Q. How high did it rise on you on the stove, approximately? (Witness indicating; Mr. Maury measuring).

Mr. MAURY: 3 feet 11 inches.

A. That is what I said: four feet I should judge.

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W. M. COMBES,

being first duly sworn as a witness in behalf of the defendant, testified: [398]

Direct Examination:

(By Mr. Jameson).

My name is W. M. Combes. I live at Sidney, Montana. I am in business in Sidney and am also an aviator. I was in Sidney the morning of June 7, 1929. I was called between 3:00 and 4:00 in the morning at Sidney to go on a special trip and that trip took me over the territory between south of Glendive and between Glendive and Baker over Cedar Creek, and during the trip it also took me over Wibaux going east, or going east and then coming back west. I made this trip by airplane. I passed over Wibaux going east between the hour of 9:00 and 10:00. I took almost a direct course from Glendive to Wibaux. Glendive is northwest of Wibaux and I was flying to the southeast, but I was flying on the north side of the railway track all the way across on account of the wind that day, and when I came over the divide which is out about four miles west of Wibaux, which is approximately



(Testimony of W. M. Combes.)

1,000 feet higher than what it is in Glendive; I was flying at 1,000 feet altitude and possibly a mile or a little over a mile north of the railroad track, and when I came to the straight road—there is a straight wagon-road leading out about four miles, something like that, east and west, from Wibaux, and I was practically over this wagon-road, that is north of the railroad track, flying east. Of course, that was my errand; that was the reason of this special trip—it was due to high water—that was the reason I was flying that day, 200 or 250 miles of that territory. The course that I took over the town of Wibaux, I came just almost over the school-house on the north side of the track; that is a large building in the northwest part of town, sitting up on the high ground. When I first sighted Wibaux—not of Wibaux but of the valley—I was 12 or 14 miles before I got to Wibaux, when I first sighted the valley due to the elevation between Glendive and Wibaux, and then when I got to the divide—to this road—the end [399] of the four-mile road going east and west, then the main highway turns south approximately one mile. Of course, I was familiar with this road—I didn't pay any attention to the railroad or anything else. The low country was all covered with water or all the depressions were, but I had sighted this river back about 12 or 14 miles on the north side of town. When I came over this road, I knew I must be getting close to the town of Wibaux; I was on the blind part of

(Testimony of W. M. Combes.)

the ship and blind part of the town. When I came to this road going east and west on the north side of town, I knew I must be getting close to Wibaux and I varied my ship so I could get a view of the town; I was about a mile and a half out of the town. I was up about 1,000 feet; I wanted to see what was going on and I dropped my altitude and flew down to probably 50 to 100 feet of the water just between the schoolhouse and—well, between the schoolhouse and the viaduct, that was the lowest point, between that and going in front of the depot—that was the closest to the water, I might have been about 50 or 100 feet; I came close to the schoolhouse. The town was practically all flooded. There was a very large number of people standing on the track between the schoolhouse and the depot and also in front of the depot; they were down this way a little farther,—closer to the viaduct there; they were standing along in there and in front of the depot—that is where these people were standing, and in coming down, when you get down close to the surface, of course, you just get a very rapid, quick view of what is in front of you in that time, unless you pick out something special to look at,—because flying down from the altitude where I was,—the altitude I attained close to above the trees and the water, I was going a rapid pace; you get speed you see, coming down from the altitude, you gain speed you see. The water was all through the town, both north and south. Using the



(Testimony of W. M. Combes.)

pointer to indicate just where the water was,—the water was all through the viaduct and [400] the hotel building (pointing to building); that was the only building I was acquainted with in the town. Of course, it was within a few—I thought at the time it was within 18 inches of the top of the door. Of course, that way when I went back to Glendive and this part of town was all under water, otherwise, the people were standing along close to this place and in front of the depot; in front of the depot was where the people had congregated. In this space opposite the hotel, along the track here, and this territory was all under water here. It was up when I came through; this represents the church here and the water was up close to this bank. I am describing the territory now north of the railroad track. Here is that schoolhouse I came down past; here is the line of flight I came. I was one mile north and I came down on an angle past the schoolhouse; that would be very near a southeasterly direction across the schoolhouse. North of the track the water was very wide; it was better than half a mile wide in places and in places, wider than that; it varied according to the height of the ground. As I say, when you get down close, you don't have the view as when up high. The southerly part of town and territory immediately to the south of Wibaux was all under water. It was probably a half a mile or better, wide right close to town there,—it looked to be. As I came over the



(Testimony of W. M. Combes.)

hill I could see on the north,—before I got to the hill west of Wibaux, I could see the river much farther at first on the north than I could to the south, because the river leaves the place in a north-easterly direction from Wibaux, and I was looking down the river, then up it. I could see it possibly 18 or 20 miles. As to the condition of the water for that distance, it looked like a very wide stream and that is what impressed me—it was a river instead of a creek; it looked to me like the Yellowstone or the Missouri—I don't mean the Yellowstone down around Billings, I mean the Yellowstone [401] between Sidney and where it empties into the Missouri, and the territory between Williston and where the Fort Peck dam is located. I had flown over this territory many times before. The creek is very crooked, in normal times you can only see the water when you get directly over it; you can only see the water where you are looking lengthwise of the creek and not across it,—I mean in normal times,—and the morning of June 7th it was practically a straight stream; it was spread possibly some places one mile or more and some places a little less than that, but I should judge, as far as I could get a description of the width of it, the average was between a quarter and a half a mile wide, and you could get the width of it very distinctly from two to five miles distance, and of course, you can see it farther than that. As to whether during that entire distance, it appeared to

(Testimony of W. M. Combes.)

be a quarter to a half a mile wide, will say that there appeared to be practically no difference in the width. It was moving very fast. You could distinguish the flotation in the stream; particularly in high waters the flotation moves very rapidly, and of course, you always distinguish it by the stationary objects. I mean by flotation, the forms—tumbleweeds that collect, and the trees and the objects that are floating in a swollen stream. That water on the morning of June 7th was flowing north. It was moving very rapidly; that pertains to the stream for the whole distance that I have described. It was a very large stream north of the railroad track. You couldn't tell scarcely any difference between the north and the south as far as the stream was concerned, only when you get over the town you are unable to see as far north as south, because the river changes its course and flows a northeasterly direction. Northeast of the town the water was practically the same width and flowing the same way and the same speed as it was south of the track. [402]

Cross Examination:

(By Mr. Maury).

My machine was not equipped for flying blind. I had to keep my eye on the equipment and steering gear in driving my machine and you have to on a blind-flying machine also. I certainly understand what is meant by "flying blind".

Q. You wouldn't pretend to say that your sight of the height of water in Wibaux was anything

(Testimony of W. M. Combes.)

nearly as accurate as Mr. Oien's measurements of water marks made within the month or so afterwards,—following?

I don't know what measurements were made. I wouldn't think at all that my estimate of how high the water was in Wibaux on the north or the south side of the track, and the width on the north or the south side, was nearly or anywhere near as accurate as a civil engineer's measurements of marks made a month afterwards: you can't estimate with the eye as accurately as with an instrument. As I was telling you,—as I came down, I had to steer more carefully because I might get too low and might hit something. I wouldn't be positive, but it was between 9:00 and 10:00, when I got there, after the time I left Sidney. I didn't leave Sidney at 9:00; I was called between 3:00 and 4:00 in the morning.

Q. Your's was not the first airplane that went over about 5:00 o'clock and woke up Edith Jones and Massey?

A. It was reported to me there was another plane. I was not over there at that time; I went over between 9:00 and 10:00. Another plane was reported to me; all I know is what was reported.

When I looked over Wibaux there, I would estimate that the water was between 18 inches and two feet of the top of the doorway of the Milton Hotel, because that was the only place I was personally acquainted with outside of the field I had been



(Testimony of W. M. Combes.)

landing on east of the town. The hotel I mention is the Milton Hotel fronting on Orgain Avenue. I didn't notice whether there [403] were people on top of buildings or not, because when you are flying, you don't notice small objects unless your attention is drawn particularly to them. But I did notice there was a lake from the region of the stockyards clear across to the Catholic church; the reason I noticed that is because our landing field is just south of the stockyards. It wasn't covered, it is upon the hill. I knew from my vision that the town was badly flooded, I could see,—it was. I could get a vision all up the valley—if this model were extended as far as the brick building over there (across the street) on the model,—and all up that valley, between 9:00 and 10:00 on the morning of June 7th, it resembled the Yellowstone River at Sidney, during high water. The width of that River at Sidney—the one I have in mind, it varies, less than a quarter to a half a mile wide. It is very deep in places; in narrow places it is very deep; at other places it isn't so deep. The shallower places are far wider,—sometimes one mile wide; it gets more than that. It (Beaver Creek) is called a creek, but it was a “river” that morning. I don't know the United States Government's distinction between a river and a creek.

Q. The United States Government's distinction—that a river is a stream that drains 100 square miles or more, and less than that for drainage area

(Testimony of W. M. Combes.)

is a creek. Were you speaking of that definition?

A. No. I was speaking from the appearance.

At least for 18 to 20 miles to the south, upstream from Wibaux, there was a volume of water coming towards Wibaux that I make as a fair comparison as of the Yellowstone River at Sidney. Don't get that I saw that river when I was flying down close to Wibaux. I would say that it went upstream in that volume for at least 20 miles,—well, you can get a good observation from two to approximately five miles in viewing it, and your view is estimated on the way it diminishes in size in distance. I could see [404] the river 18 miles south of Wibaux, between 9:00 and 10:00 in the morning. As to whether it was out of the banks all the way down except where it struck exceptionally wide places, will say that it was just the same as any other high, wide stream; it would vary in direction there, but it was out of the banks, that is, taking a different course than what the creek took or the water,—I had ever seen the water in the creek take. From general appearance to the eye, I would say that that river between 9:00 and 10:00 on the morning of June 7th, was just as big 18 or 20 miles south of Wibaux as it was close here to Massey's ranch. I couldn't see any tributaries—side coulees—of that river flowing high—not that I noticed; as far as I noticed, it made no impression. I said that was the highest I had ever seen that river. I did not see that river equally as high about 2:00 o'clock June 7th. At that time, I was down in the Cedar

(Testimony of W. M. Combes.)

Creek gas fields. I saw it later in the day than 9:00, and later than 10:00; I saw it between the hours of 11:00 and 12:00. It was running very swift then. As to how high it was then, you couldn't tell very much difference in it at that time than the hour I went over it before. At that time, I crossed—I was going west about one mile south of the depot, we would say about here (indicating) about one mile south of the depot, and I was flying at a much higher altitude, so I could get a better view—long-distance view. At 11:00 o'clock in the day the river 18 to 20 miles south looked equally as high as at 10:00, and that was June 7th, between the hours of 10:00 and 11:00.

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BERNARD BLUM,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is Bernard Blum, reside at St. Paul, and I am a civil engineer. I am connected with the Northern Pacific Railway. [405] Have been connected with that company 27 years. I have been here in the courtroom this last week listening to the testimony in this case. I heard the testimony of Mr. Sutherland as to a meeting between officials and citizens of Wibaux and Mr. Rapelje in 1922, and also heard the testimony of Mr. Cullen with ref-



(Testimony of Bernard Blum.)

erence to that same meeting. I was present at that meeting.

Q. Will you tell the court and jury—I don't suppose possibly you can tell it word for word what took place there—but give it to us as near as you can what was said, in substance what was said by people of Wibaux there and what was said by Mr. Rapelje?

A. We arrived at Wibaux one April morning in 1922 on a special train, stopped at Wibaux, got out and met a delegation of citizens in accordance with request that we meet with Mr. Rapelje. Discussion was had about depot construction; the matter had been talked of previously. Mr. Rapelje informed the delegation that conditions were such that we couldn't consider building it at that time. Furthermore, the depot construction was involved with the replacement of the so-called viaduct or bridge over Wibaux Street. That matter appeared to be settled to the satisfaction of the committee and then the delegation brought up the question of the conditions at the undercrossing of Wibaux Street and the railroad track; there was complaint about the drainage. It was then in the spring; the ground as I recall, was wet. We all went down on the ground under the bridge and found mud, and discussed it, and we assured the citizens that the matter would be taken care of by repairing the sidewalk with cinders and a stringer and doing a little grading up and ditching. The question of a permanent subway was also discussed at some length

(Testimony of Bernard Blum.)

as I recall it, at the time the viaduct was built, it was with the understanding that a permanent structure would replace the temporary pile bridge when the condition of the pile bridge was such that replacement must be made. I am now speaking of the bridge—the pile bridge—at the crossing [406] of Wibaux Street and the Northern Pacific main track; it has been referred to at this trial as the viaduct. I speak of it as the “pile bridge”, and it has also been referred to as “viaduct”,—anyway, it is the structure at Wibaux or Main Street that I am talking about. The attention of the committee was called that the head-room or the vertical clearance from the surface of the street to the underside of the stringer supporting the track was such that with the construction of a permanent bridge it would be desirable to increase that head-room, and on account of additional space required for construction to support the track, it would be necessary to raise the track a substantial amount in order to place a permanent bridge. Mr. Rapelje told them that the condition of the bridge was such that we should not be called upon at that time to replace it, but that we would keep the matter in mind and take care of it as soon as possible. When I used the word “bridge” just then, I am referring only to the bridge or viaduct over Wibaux Street. We were standing first at the meeting, at the west end of the depot platform adjacent to the bridge; we had repaired at that time to the street under the viaduct,—that was Wibaux Street; so when this con-



(Testimony of Bernard Blum.)

versation took place, we were standing on Wibaux Street right underneath the so-called viaduct or bridge across Wibaux Street. That matter appeared satisfactory to the committee, and then one of the citizens said that there was another matter that they desired to take up, and that was the condition opposite the high school, which is on the north side of the Northern Pacific track and about two blocks I think, possibly three blocks, west of the depot. Wibaux is a water station—Northern Pacific—and at that time, practically all freight trains stopped at Wibaux for water. This resulted in eastbound trains standing opposite the schoolhouse and at the time that the children were going to or from the school, it blocked their passageway across the tracks [407] and it had not been infrequent for children to cross underneath the cars. The railroad was requested to do something to relieve that condition and we discussed the matter of a foot-subway,——

Q. Now, we won't go into the details about the subway up there Mr. Blum. What if anything was said by the citizens of Wibaux or by Mr. Rapelje with reference to lengthening—what if anything, was said with reference to lengthening the bridge over Beaver Creek?

A. No reference was made to the bridge structure over Beaver Creek except as I recall it, it was brought to the attention of the committee that when we should build the permanent structure over Wibaux Street, it would necessitate raising the track structure in the vicinity of Wibaux Street and the depot, which raising would have to be carried east



(Testimony of Bernard Blum.)

of Beaver Creek and that would require raising the bridge over Beaver Creek, which indicated the extent of the project in cost and construction of the permanent bridge over Wibaux Street.

Cross Examination:

(By Mr. Maury).

I call the viaduct a "bridge". After the meeting was over that day, I went up to where the children's viaduct is now. It is my recollection that Mr. Stevens was with me when I went up there. I do not recall that Mr. Paul Fisher, a banker at Wibaux, went with me; I am quite certain that he didn't. Mr. Stevens at that time, was chief engineer of the Northern Pacific. To my recollection he went alone, but the meeting was over when he went up there. I do not recall that any others of our party went to the place where that children's viaduct is now with some of the citizens of Wibaux.

Q. Would you say that none of them went up there and pointed out where they wanted this little viaduct for the children to go through?

A. It is my recollection that they didn't because it wasn't necessary on account of the natural depression at that [408] place, which we could see from the track at the west end of the depot—from where we were standing when we discussed the matter.

Q. That natural depression was a swale or slough?

A. I wouldn't call it a swale. A swale, to me,

(Testimony of Bernard Blum.)

means a natural depression in the ground and a slough is a continuous depression in the form of a watercourse that is usually wet,—that has water in it.

Q. Now, as to the viaduct here, (we will call that “viaduct” all the way through with your permission, and not a “bridge”).

A. Yes.

Q. What was said about that viaduct by Rapelje or Stevens or you, in Rapelje’s presence?

A. I don’t remember that anything more substantial was said than what I have already stated. We examined the condition of the bridge to come to some conclusion as to the time about which it would be replaced. It was stated, possibly I am repeating—that our general plans were for that bridge, were the same as any other timber structure on the line,—to replace it in permanent form at the time the building was necessary and the money was available.

Q. Did you not say that plans were already in existence, or did not Rapelje say there, or Stevens,—one of the three of you—that plans were already in existence for raising that track by the viaduct and placing in a new concrete viaduct?

A. I think I may say that no such statement could have been made, because we had no plans at that time for a permanent structure at that place.

Q. Did you say, or was anything said about raising the level of the track all the way from a point up here about opposite the elevators to the opposite hillside?

(Testimony of Bernard Blum.)

A. A general statement was made that it would be necessary to raise the track in constructing a permanent bridge at that place; that was brought out as one of the elements of cost necessary in a permanent bridge and, therefore, the construction of a permanent bridge at that place was a far more expensive proposition than would obtain in the construction of 4-span pile bridge. [409]

Q. Was it not said that the element of expense would enter into the river bridge?

A. It was said that the expense of raising the river bridge was a part of the expense of raising the track, yes, sir. That conversation as near as I can tell you, and by having refreshed my memory from records that I have, was the forepart of April, 1922. The new concrete viaduct placed at this point on Main or Wibaux Street, was started in the late summer of 1929 and completed in the fall of 1929. That is correct,—seven years elapsed between the time that Rapelje and I suggested that that change would be made there and from the time that work commenced on it; work was not commenced on it until after the June 7, 1929, flood. I spoke of this viaduct being muddy the day I went there,—there was a little mud underneath it where the people walked on the easterly side of Wibaux Street.

Q. And there was complaint that it was muddy?

A. There was complaint made; that is one of the reasons we went to Wibaux. As to whether I know that water had shortly before that, flowed from the swale into the viaduct,—will say that I



(Testimony of Bernard Blum.)

know there had been some water underneath the viaduct, but I don't know that it came from the so-called swale or slough.

I was a witness in Baker some two and a half years ago in a case involving the flood of June 7, 1929. As to whether I made the answer bracketed here (Transcript on Appeal, Heckaman v. Northern Pacific Ry. Co., page 839), will say that these are not my exact words, but I presume they are substantially what I said; it is in narrative form; it is not a direct transcription of my remarks. By narrative form, I mean something that a court reporter takes and reduces from question and answer, in his own words, to what a witness says.

Q. In the witness' own words.

A. Well, I don't know how—just how he does that. Reading what I said at that trial:

“On occasions when there would be water in the slough or [410] swale then the viaduct would act as a spillway for that water; and it so acted from 1912 until June 7th, 1929,—anyway—whenver there was high water; whenever high water was coming down to the swale.”

Yes, sir; in other words, that is a general statement that an opening there would act as a waterway in case water got up that high, and of course that is self-evidently correct.

Q. And by records kept by the Northern Pacific, you understood that water had gotten up that high——

Mr. McCARTHY: Objected to as not proper cross examination.

(Testimony of Bernard Blum.)

Mr. MAURY: I hadn't finished the question.

The COURT: If you want to make him your witness, put him on.

Mr. MAURY: We may in rebuttal.

I know a man named W. C. Sloan. Mr. Sloan was a member of the Rapelje party on that day.

Q. Mr. Sloan was at three trials at Baker?.

A. Yes, he was at three trials at Baker, but I think testified only at two trials—the first and third. Mr. Sloan is not in Billings at this time; he is on the high seas.

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Testimony of

W. C. SLOAN,

who had been first duly sworn as a witness in behalf of the defendant at the trial of Case No. 2444, Wibaux Realty Company, a corporation, (and other cases) vs. Northern Pacific Railway Company a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 15th day of January, 1934, was read at this time by Mr. Jameson, as follows:

“Direct Examination by Mr. McCarthy:

My name is W. C. Sloan. I live at Seattle, Washington, and I am General Manager of the Northern Pacific Railway. I have been connected with the Northern Pacific Railway Company twenty- [411]

(Testimony of W. C. Sloan.)

five years, this coming April,—first of April. In 1921, the position that I held with the company was Division Superintendent of the Yellowstone Division, with headquarters at Glendive, Montana. Wibaux, Montana, was included in the Yellowstone Division at that time.

I recall an occasion while I was Superintendent of the Yellowstone Division, of Mr. Rapelje and a party of railway officials meeting with some of the people of Wibaux; that was in the spring of 1922 I believe. At that time, Mr. Rapelje was Operating Vice-President of the Railway. I was present at that meeting. The subject of discussion, as I recall it, was principally an opening for the school children at the high school and the question of drainage under the underpass used by vehicles across the street; that is the underpass at Main or Wibaux Street immediately west of the depot. There was nothing said that I know of, at that meeting regarding the lengthening, widening, altering, or in any way changing the bridge of the railway company over Beaver Creek. I was with Mr. Rapelje all of the time, I was there all of the time that he was talking with the people of Wibaux; in fact, was with him. I ceased to be Superintendent of the Yellowstone Division in the spring of 1924,—so that from 1921 to the spring of 1924, I was Superintendent of the Yellowstone Division all of that time,—from November, 1920, until the spring of 1924; there was no part of that time—those four years, approximately—that I was not Superintendent.



(Testimony of W. C. Sloan.)

Q. Now, Mr. Sloan, you may tell the court and jury whether any time during the four years of your superintendency of the Yellowstone Division, you were asked either by letter, verbally, or in any manner,—whether you received any request from Wibaux or the people of Wibaux, the Mayor or the Council, or anybody connected with it, the Commercial Club, or anyone else, to lengthen, widen, alter, or in any manner change the bridge over Beaver Creek? [412]

A. I did not receive any such request.”

Mr. JAMESON: Did you want to read the cross-examination?

Mr. MAURY: I will read the cross-examination:

“Cross Examination by Mr. Maury:

“At the last trial of these cases I was here during a portion of the time,—or similar cases—I was here during a portion of the last trial and most all of the trial before Mr. Maury. I don’t believe I heard Mr. Joe D. Cullen testify here last September or October. I am not positive of that Mr. Maury, that he was brought here as a witness for the railway; I understand he was.

Q. Do you recall, Mr. Sloan, Mr. Cullen’s testifying that, “In the meantime, the party was”——

Mr. McCARTHY: I suggest you let him read it; let him read all of Mr. Cullen’s testimony.

A. I did not hear Mr. Cullen testify.

Q. You did not? Was it brought to your attention that Mr. Cullen—I mean by the counsel for

(Testimony of W. C. Sloan.)

the railway—during the last trial, that Mr. Cullen had testified that, in answer to a question: “Was there anything said Mr. Cullen, with reference to lengthening the bridge over Beaver Creek?” (pg. 371, Case No. 2438, etc.), and he answered: “Not as to lengthening it. That was one of the items of expense that he mentioned in connection with the making of this viaduct.”——

A. I read Mr. Cullen’s testimony.

Q. Just a moment. “My recollection is, he said: ‘We will have to build a new bridge down there after we raise this track four or five feet.’” Was it brought to your attention?

A. I read Mr. Cullen’s testimony; yes, sir. As to whether that was brought to my attention, will say I have read it in his testimony. I did not take the stand during the last trial. How many days I was here? Oh, I don’t know; I think about probably three or four; maybe it was four or five, Mr. Maury. [413]

The replacing of the timber structure over Main Street with a concrete structure was discussed at that meeting. As to when, according to my best recollection, that conversation was wherein Mr. Rapelje and myself, and Mr. Cullen and some other citizens of Wibaux were discussing it, will say that the meeting took place, as I remember it, in the spring of 1922. I have not tried to consult any official or any memorandum that I made in the nature of a diary or something else, to determine the exact date of that meeting; I have seen some

(Testimony of W. C. Sloan.)

of the correspondence. I have seen Mr. Rapelje's report to Mr. Donnelly and such files as we have. By a concrete viaduct, I mean a viaduct such as exists there now—practically so. That was placed there in 1929, I believe,—after June 7th,—after the old viaduct was badly injured. I think that was June 7th. I was in Wibaux soon after June 7, 1929; I couldn't tell you what date—probably four or five days, or six days after the high water.

Q. Were you there in 1921? Soon after June 21st?

A. Yes, sir."

Mr. MAURY: And there were some objections. Is there anything further here except objections and arguments to the Court?

Mr. JAMESON: I don't know; I didn't read it all.

“Redirect Examination by Mr. McCarthy:

(Mr. Maury reading).

Q. Mr. Sloan, in Mr. Cullen's testimony there, there is a reference there that counsel has called to your attention. If the viaduct was put in in 1921, what if anything, would have had to have been done with reference to the rails east and west of the viaduct for some distance?

A. Well, the plan was to raise that sag. It had been there for a good many years, Mr. McCarthy; and the permanent structure was contemplated at a higher elevation to give not only head-room, but to raise the sag in the street. And Mr. Rapelje told



(Testimony of W. C. Sloan.)

them at that time that this wooden structure was going to be carried [414] for its life and when they rebuilt or raised it in connection with its permanent form, that it would be done in connection with the track-raise through there. That track-raise would cover probably, on the west, a matter of a quarter of a mile and on the east, considerable more than that—probably half a mile.”

“Recross Examination by Mr. Maury:

That track-raise on the east would carry it past the bridge, I don't know exactly what distance past the bridge; I would say approximately 1,000 or 1,200 feet. You see, that is right in a sag, Mr. Maury, and it would be leveled across there. As to what, or how much of a track-raise was discussed at that time, I don't remember of any specific track-raise being discussed, but we always planned to raise it five or six feet through there. As to whether I mentioned that we had plans already made to raise it five or six feet, will state that Mr. Rapelje said there were plans to raise htat sag. It was objectionable for our passenger train-stops also; it wasn't difficult; it was objectionable; in fact, the railway company could operate better on a less grade there—that is it.

Q. Was it discussed that it would be raised five feet and that there were plans to raise it five feet?

A. The exact raise may have been mentioned, but I don't remember that. I know the question of raising the track and raising the depot and all.—I cannot tell you positively whether or not at that

(Testimony of W. C. Sloan.)

time, the company prepared plans to raise the track five feet,—but I doubt it.

Q. But “plans”, to a superintendent of a railroad, has two meanings of the word; one meaning is a purpose of the management, and the other drawings and specifications made by engineers, are there not? You use the word in two meanings?

A. Do you mean specific plans drawn or contemplated,—or ideas,— [415] is that what you mean?

Q. Yes, sir.

A. There were ideas to raise that sag, yes, sir—no question about that.

Q. I am speaking of the words that you gentlemen use. You may use the word “plan” to denote a purpose?

A. That is true.

Q. And you use the word “plan” to denote what drafts have been made by engineers for future construction work, do you not?

A. That is true.”

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J. T. DERRIG,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is J. T. Derrig. I am employed by the Northern Pacific Railway Company; have been

(Testimony of J. T. Derrig.)

connected with that company 27 years. I knew Mr. Rapelje, whose name has been connected with the Northern Pacific Railway Company, from 1906 to the time of his death—about 20 years; Mr. Rapelje is now dead. I am very familiar with his signature. Having been shown defendant's exhibit J and my attention called to the signature on page 5, that signature is Mr. J. M. Rapelje's. The stamp on page 1 is the stamp of the President's Office, indicating the date on which the letter was received in the President's Office,—the President of the Northern Pacific Railway Company. I have seen this letter before; I have seen the letter in the President's Office and also obtained it from the President's Office. I heard the testimony of Mr. Sloan just read by Mr. Jameson, in which he refers to having read the report of Mr. Rapelje to Mr. Donnelly, the President of the Northern Pacific; defendant's "J" is the report referred to.

Mr. McCARTHY: Defendant's "J" is offered in evidence.

Mr. MAURY: We object as hearsay and having no bearing [416] upon this case—

Mr. McCARTHY: Pardon me, just a minute. I will withdraw the offer temporarily.

Q. Mr. Derrig, do you know what the practice of Mr. Rapelje was when he was out on the Line with reference to making reports to the President?

A. He made reports of his work or investigations that he made immediately following—usually



(Testimony of J. T. Derrig.)

those reports were written the evening following the day's work, and those reports were made in the regular course of railroad business; defendant's "J" is such a report.

Mr. McCARTHY: Now, we offer defendant's "J" in evidence.

Mr. MAURY: We make exactly the same objection and in exactly the same words that the counsel for the railway made to the city records of Wibaux—that it is hearsay; that it is silent as to the bridge at Wibaux—has no reference to it; that it is a matter *inter alios*, and merely has a tendency to encumber the case with useless stuff not competent, nor relevant nor material. I think you will find, your Honor, that it has no reference to the bridge at Wibaux.

(Jury retired) (Argued by counsel)

The COURT: This has been identified as a statement or report prepared by Mr. Rapelje himself at that time, and I think I will admit it for the purpose of showing what he said and did there and for what it may be worth along that line. It refers particularly to that meeting and his presence there, and he is dead and gone and there is no way of contradicting his testimony or knowing what he did say except by that identified report. I will admit it for the purpose only—that portion of the report which refers to the meeting at Wibaux.

Mr. McCARTHY: May it be understood that this may be received as an exhibit and the reporter

(Testimony of J. T. Derrig.)

substitute a correct [417] copy of it and the original may be returned to us?

Mr. MAURY: We except to the Court's ruling.

Mr. JAMESON: I am skipping over to the part that refers to the meeting at Wibaux and reading the part pertaining to Wibaux: (reading)

“DEFT'S. EXHIBIT ‘J’ ”

No. 2438 9/29-33

“President's

File 542 A-69

Northern Pacific

Office of the

Apr 11 1922

President

Railway Company

“On Line, at Billings,  
April 9th, 1922-rg.

Mr. Charles Donnelly,  
President.

\* \* \* \* \*

I received a telegram from the Mayor at Wibaux asking if we would stop and meet a delegation there, to which I replied that I would be glad to do so. On arrival there we met the Mayor and eight or ten citizens. I expected, of course, that they wanted a new depot also, as the question of a new depot at Wibaux was up during Federal Control. The situation at Wibaux is bad, although there is no reason why they cannot get along there for a year or two

(Testimony of J. T. Derrig.)

without any inconveniences or hardships. The committee expressed themselves that they did not expect a new depot and were not going to ask for it. I told them that we had the matter of a depot for Wibaux in mind from the fact that it had been brought up before, but the situation at Wibaux was a very difficult one and one that would take some study and probably cost a lot of money to work out a satisfactory and permanent arrangement, and that we were not considering that at this time.

The main reason for wanting to meet the railroad officers was on account of the bad condition under our overhead bridge immediately west of the depot. The situation is not serious; the drainage is not good, and the place was quite muddy on one side. With Mr. Stevens, Mr. Blum and Mr. Sloan, we worked out a plan of taking care of the drainage so that the road could be rounded up and no doubt will be satisfactory for the present. This is simply a matter of digging a little ditch and cleaning out [418] near the end bents of the bridge; two or three men can do this in half a day.

Another point that they brought up was the question of a subway or crossing under our tracks west of the depot and opposite the school house. The school house is on the north side of the track; a large majority of the children live on the south side and have to cross our tracks. Practically all east-bound freight trains stop at Wibaux for water, and



(Testimony of J. T. Derrig.)

when they stop for that purpose, the rear end of the train extends over the crossing, and when trains happen to be stopping there during the time the children are coming and going (and this happens frequently) the children crawl under the train unless the trainmen stop them from doing it. We have so few trains now that all of our trainmen are old employes and know all about the situation and they watch the matter very closely, at the same time, the little ones do occasionally crawl under the train despite this fact. Of course, there is always danger, even when there are no trains standing there, of a train coming along and catching the children as they cross the track. I did not promise the Committee anything on this but told them I would look at it when I went by, which I did, and I am having an AFE prepared to put in a little opening under the track so that the children can get through without crossing over the tracks. This probably can be done for three or four hundred dollars. AFE will be submitted as soon as it is prepared.

\* \* \* \*

J. M. RAPELJE."

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The letters AFE in the report refer to Authority for Expenditure. This exhibit, as counsel read it, "On Line, at Billings"—the words "On Line" indicate that the letter was written On Line, at Billings. Mr. Rapelje's office was in St. Paul. The practice of an official would be that he would write

(Testimony of J. T. Derrig.)

that letter on his business car when he got in at night. If he was in his office, [419] the letter would be headed "St. Paul", and if he wrote it on the Line, it would be dated at the station he was at and "On Line."

Cross Examination:

(By Mr. Maury).

Mr. Rapelje might refer to "plans" as visual plans, or know that the bridge had to be raised four or five feet. It would not necessarily mean we had detailed plans for the construction of a bridge prepared.

Q. Now, do you know whether he had in mind plans for the raising of that bridge here at the date of the conversation?

A. I would say Mr. Rapelje, in referring to "plans", he would refer to plans and probably a profile of the Division, he would know that it would be necessary to raise the bridge. In my work I didn't report to Mr. Rapelje direct, but I knew him in a business way and had contact with him. I have rode over the line with him on business trips and knew him personally, and in connection with my construction work out in Montana. He was a man that did not use useless words.

Q. And if those plans were already in St. Paul for raising that track seven years before it was done, there was no use on earth about Rapelje writing about the plans——

A. I happen to know the plans were not prepared.

(Testimony of J. T. Derrig.)

Q. What did the testimony mean when Sloan said: "We spoke of plans for raising the track and raising the bridge?" What was being talked about?

A. He may have in mind plans,—visual plans, of repairing the bridge.

Q. Sloan is just as competent business man as Rapelje?

A. Yes, sir.

Q. When he spoke of plans, and said it in his testimony at Baker, he knew what he was talking about?

A. I didn't understand he said detailed plans.

Q. He said there were plans mentioned at that conversation?

Mr. HALL: We object; that isn't in his testimony. [420]

Mr. MAURY: Yes, it was.

The COURT: That is quite important. You better locate it. See just what he did say about that.

Q. You heard Mr. Sloan testify at Baker. I am talking about the General Superintendent of the railroad, Sloan. You heard him answer: "Well, the plan was to raise that sag. It had been there for a good many years, and the permanent structure was contemplated at a higher elevation to give not only head-room, but to raise the sag in the street. And Mr. Rapelje told them at that time that this wooden structure was going to be carried for its life and when they rebuilt or raised it in



(Testimony of J. T. Derrig.)

connection with its permanent form, that it would be done in connection with the track-raise through there.” You heard Sloan testify about that?

A. Yes, sir.

Q. He is a good business man?

A. Yes, sir.

Q. And “that track-raise would cover probably, on the west, a matter of a quarter of a mile and on the east, considerable more than that—probably half a mile.” You heard him say that?

A. Certainly. A half a mile east of this viaduct is way beyond the railroad bridge.

Q. And now you heard him speak of plans——

A. I beg to differ with you; that word is “plan”.

Q. And wasn’t Sloan asked this question: “And did you mention that you had plans already made to raise it five or six feet?” He was asked that?

A. Yes, sir.

Q. And didn’t Mr. Sloan say at the other trial: “Mr. Rapelje said there were plans to raise that sag.”

Redirect Examination:

Q. Mr. Derrig, does the railway company, or officials thereof, frequently have projects in mind for which there are no plans?

Mr. MAURY: Objected to as repetition.

The COURT: I think that has been gone over, Mr. McCarthy. [421]

Q. Was there a plan to build an extension from the Redwater branch all the way to Lewistown?

(Testimony of J. T. Derrig.)

A. Yes, sir.

Mr. MAURY: Objected to as entirely outside the issues.

The COURT: Sustained.

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JOHN OIEN,

called as a witness in behalf of the defendant, testified:

Direct Examination

(By Mr. McCarthy).

In connection with the surveys to which I have already testified in connection with the examination at Wibaux and vicinity, I examined Beaver Creek and the country to the south of Wibaux. As to what the average width of Beaver Creek is between the banks where the banks are clearly defined, will say that where the banks are well defined and the creek fairly straight,—no erosion going on, so to speak, the width is from 65 to 70 feet. As to the character of the volume of water ordinarily that passes down Beaver Creek,—low-water, there is very little, just a trickle.

Q. Mr. Oien, this relief map here has been received in evidence and it has been referred to, and the engineer for the plaintiff here has accepted it. You heard Mr. Lyman's comments on it, did you?

A. Yes, sir. Now, he criticized the map at the vicinity of the county bridge. I have examined this

(Testimony of John Oien.)

relief map at the point indicated; I have checked the map. I made a cross section of First Avenue South; that is already in evidence here. The relief map corresponds with the cross section introduced in evidence by the plaintiff but which cross section was originally prepared by me, as closely as can possibly be. The measurements contained on that exhibit Y-4, cross section that has been introduced in evidence, of First Avenue South, were checked by both Mr. Lyman and me. I went down into Wibaux with Mr. Lyman and the two [422] of us checked on the figures on that exhibit together; Mr. Lyman was satisfied it was a correct section. Reference has been made to the road east of the county bridge, at least there has been an intimation that the road was lower to the east of the county bridge. The fact is, it is a depression across there, but the road is carried on the fill across the depression. I don't know about the conditions prior to the 1929 flood,—as to the road being on the natural surface of the ground or otherwise; I wasn't there. The bridge was a little higher than the road.

Q. Do you know whether the fact that the bridge was higher than the road was due to the fact that the bridge had been built up higher or whether the road had been scooped out to the east?

A. No, the road wasn't scooped out; the bridge was built up. There is an official designation for that road—the Red Trail. I wouldn't say it is now a part of the Yellowstone Trail; it connects with the



(Testimony of John Oien.)

Yellowstone Trail; it is a through-road. The surface of that road is a gravel-scoria.

Q. Graveled road? Can you give us any idea how high that road is?

Mr. MAURY: We would suggest that is evidence of what has been done there long after June 7, 1929.

A. I don't know as it is. I didn't understand that is what you were referring to.

Mr. McCARTHY: I was trying to get at it prior to the flood.

Mr. MAURY: Mr. Oien says he doesn't know anything about it.

Q. Do you know whether or not before the flood the roadway east of the bridge had been scooped out or the bridge was simply higher than the road and that accounted for the raise.

A. My impression is that the bridge was higher than the road shortly after the flood and you could see traces of it. From the marks I could see there, the height of the road above the natural elevation I should say was a couple feet.

This relief map was prepared from surveys and contour maps [423] made under my direction, actually by me; I have checked the map carefully.

Q. Calling your attention Mr. Oien, to the relief map and particularly to the road which you have said was the Red Trail road east of the county bridge, and to a point about six inches on the map directly to the east of the easterly end of the county bridge, there is a white mark on the north side of

(Testimony of John Oien.)

the road and a white mark on the south side of the road. What do those marks indicate?

A. They indicate two lines of culverts. This mark to which you are pointing, which is located approximately eight and a half inches to directly south of the southerly side of the county bridge is the point where the water line is carried across the creek; it is covered up with dirt and things; the water pipe was covered up with dirt and things. A portion of the water that came from the raised sidewalk and the low land between the raised sidewalk and the elevator would pass through the culverts that I referred to; they are 24-inch corrugated iron pipes—two of them.

Defendant's exhibit Y-31 is a cross section taken about 3000 feet south of the Main Line. That was prepared from a survey that I made, and the exhibit was prepared under my direction. It is correct in all respects.

Mr. McCARTHY: Defendant's Y-31 is offered in evidence.

Mr. MAURY: No objection.

I made a cross section of Beaver Creek immediately to the south of the bank—between the banks of Beaver Creek between the city water tank and the green house, and I made a cross section in the vicinity of the Massey ranch. Those cross sections have been checked and prepared by me and they are presented in graphic form. These cross sections have been prepared more as of a permanent nature

(Testimony of John Oien.)

—they are a wooden outline. The two cross sections to which I have just referred—the exhibits just set up here—are the defendant's exhibits marked defendant's exhibit D-17 and [424] defendant's exhibit D-18, and they correctly show the cross-sections and the elevations that are marked thereon.

Mr. McCARTHY: Defendant's D-17 and D-18 are offered in evidence.

### Cross Examination

(By Mr. Maury).

D-18 is a cross section taken at the foot of E Street; on the model, it is right there; that is east of the water tower.

Mr. HALL: It runs north and south on E Street, across the street.

Q. Oh, this cross section runs north and south?

A. Yes. The distance on the model that it runs is from the top of the bank in here (pointing) and over to here (pointing), going straight north and south. It has on it "low-water"; as to whether I took low water at sometime for that, will state that that is the elevation of the water at the time I took the section. I think it was in 1931, April, that I made the measurement for this cross-section D-18. I wouldn't say that the water was higher then than I have seen it in the stream. The depth of the water at the point marked "low water" was about two feet. I have seen the water that deep (as indicated on finger).



(Testimony of John Oien.)

Mr. McCARTHY: By "this deep" what do you mean?

Mr. MAURY: Indicating the last joint on the left index finger of counsel for the plaintiff.\* \* \* \*

Q. And you have seen it less than one inch?

A. That is about 2 feet.

Q. You have seen it less than one inch?

A. Right there?

Q. You have seen it less than one inch other places then?

A. Yes; other places. This blue color is given to designate the stream there or the water. At the time this measurement was taken, the width of the creek there (witness measuring on exhibit) was about 70 feet or 72 feet. I have seen the creek this wide (as indicated by you). [425]

Mr. McCARTHY: By "this wide" you mean?

Mr. MAURY: A step of less than three feet.

The width there where I took this cross section, from bank to bank,—from this point to point,—about 72 feet. You mean from top of bank to top of bank? That distance was (witness measuring), about 85 feet.

Mr. MAURY: No objection as to D-18.

The COURT: Very well; it may be received in evidence.

D-17 is a cross section taken at Mr. Massey's ranch. The words "low water" here,—that is the elevation of the water at the time I took the section; I took that in June of 1933 I think. That was not

(Testimony of John Oien.)

at a time of exceptional high water there. The width of the creek at that time that I took it (witness measuring) was 56 feet from low-water line to low-water line there (pointing). It was three feet deep at its deepest point where I took it that day. As to whether I have seen it at that point frequently where a man could step across it, will state that I don't know about that particular point, but I have seen it in that vicinity right close to there.

Q. And you have seen it often so a man could step across it and not more than one inch deep?

A. Well, it was more than one inch there—probably two or three or four inches. The width of the banks there at that point (witness measuring) is about 78 feet.

JUROR: Q. How far is that?

A. 78 feet.

Mr. MAURY: I think any one of the jurors in Federal Court can ask questions?

The COURT: Oh, yes.

Mr. MAURY: Can ask a witness or engineer or anyone, questions. Don't hesitate to ask questions that you want to know the answers to (speaking to jurors).

The blue, of course, represents the water.

Q. Where was the model, or whatever you choose to call it—profile—[426] running to this height here that my finger is? Top of cow shed?

A. The section was taken right over the top of the cow shed. The top of the cow shed is in corre-

(Testimony of John Oien.)

spondence with the top of this model. As to whether the cow shed is right down to the level of the ground that has been described as the three or four acres by Tom Rush or the level of the banks there by Massey's, will say that it is practically the level of the bank there. The section was taken across this point here over the cow shed.

Mr. McCARTHY: Q. Running from the cow shed shown on the relief map, in what direction?

A. In a southwesterly direction, at right angles to the stream.

Q. So that if you prolonged the section of the stream, it would extend from the cow barn to the southerly edge of the relief map and to a point about how many inches to the west of the intersection of the stream line and the edge of the map?

A. Oh, about two or three inches.

As to the distance it would be across that cross section from the elevation of the bank at the cow shed until you get equal elevation on the opposite side of the creek in the direction where the cross section runs, I think that would be outside the limits of the map; it would be 800 or 900 feet.

Q. Now, the profile of this model crosses the stream at right angles—at an angle of 45 degrees when would you approach and where would you get to an elevation equal to the top of the cow shed that is in the bank?

A. Oh, you couldn't measure it on the relief map; it is too small to measure those conditions. I



(Testimony of John Oien.)

haven't notes where that point would be; I haven't got it there.

Mr. MAURY: The defendant's exhibit D-17 may be admitted.

The COURT: It may be received in evidence—both of them.

(By Mr. McCarthy).

Q. While you are there, Mr. Oien, calling your attention to defendant's D-18 first—the one down there half way between the [427] green house and the city water tank, there is a legend on here "Ground Line at Top of Bank", what bank does that refer to? Can you point out on the relief map?

A. It is the north bank of Beaver Creek in here, approximately half way between the green house and the city water tank. Then, as you notice, that the cross section from the side where the legend is "Ground Line at Top of Bank" then makes a sharp dip, then extends parallel with the table, and then slopes down again, that indicates the ground line of the bank. So that if we stood at the bank, we would see that it run just in this direction,—in the manner indicated on the cross section. Now, there are certain elevations on here—6 feet, 4 feet and 2 feet,—that is the distance above the water line; and the water at low-water, is shown on the exhibit in blue color on cardboard. Now, the heights to which I have referred, located directly above the word "North" and the arrows indicating 6 feet, 4 feet and 2 feet, indicate, with reference to the water line,

(Testimony of John Oien.)

the height above the low-water mark. The bottom of the creek bed is shown; that is right in here (pointing); the bottom of the creek bed is so designated on the exhibit. The height of this bank above the bottom of the creek bed (witness measuring) is about 9 feet. The scale of this cross section is one-half inch equals one foot—I will check that again—eight and one-half foot, about. Taking it over here, right above the arrow indicating just to the right of the wall, at this point here, the height above, the creek bank there is  $7\frac{3}{4}$  foot above the bed of the creek. The word “North” and the arrow indicates the compass direction.

Q. Now, calling your attention to defendant's D-17, calling your attention first to the cardboard that has been colored here, Mr. Oien, what does that blue color on the cross section show?

A. The dark blue color is the water in the creek at the time the section was taken; it is designated here on the exhibit as “low [428] water”. The light-blue color indicates the high water of June 7, 1929. On the left hand side of the cross section on the wooden part, is the legend “Top of cow shed”, that is the cow shed of Mr. Massey's that has been referred to frequently here in the trial. The floor of the cow shed, that is right in here; it is so marked on the exhibit; then I have the top of the cow shed according to the exhibit, is also the ground line at the top of the bank on that exhibit; and then the scale in feet is shown there. Explaining the con-

(Testimony of John Oien.)

tour of the bank at the place of the cow shed, this is the ground line and it drops clear down on the face of the cow shed and this is the creek bottom (pointing). The scale at this point indicates 14 feet plus—That is the distance above the low-water line.

Q. And that difference in 14 feet is what? 14 feet, what?

A. About  $\frac{3}{4}$  foot. The high water of June 7, 1929, I said was indicated in the light-blue color and the top of the cardboard represents the extreme height, and it is so marked on the exhibit; and the low water is also marked, and the creek bed is designated; and the scale is marked—the scale is on there.

Q. Now, Mr. Oien, can you give us the elevation of the intersection of Wibaux Street and First Avenue South?

Mr. MAURY: The plaintiff's property?

Mr. McCARTHY: Yes. Well, that is not his property, of course; it is a city street.

A. The elevation of the street 2635.

There has been received in evidence here a picture of a wall at the old Wibaux ranchhouse—Pierre Wibaux house—My attention having been called to plaintiff's exhibit "1" and particularly to the pencil cross-mark located about half way on the picture between the picture of a man standing at the end of the bridge and the telegraph pole; I can spot the wall of the Wibaux ranchhouse on that picture. This (pointing out on the relief map) is [429] the Wibaux ranchhouse and this is the wall.



(Testimony of John Oien.)

Mr. McCARTHY: The witness indicating the house immediately south of Orgain and west of the blue stream indicating the Beaver Creek, which is north of First Avenue South.

The retaining wall is located with reference to the house, straight east, and it is shown by a line running north and south and then two wings thereof. The ground elevation at the retaining wall, that is the retaining wall directly east of the Pierre Wibaux ranchhouse,—in front of the stone wall, that is on the east side, the elevation is 2626.7. The height of that wall on the east side, the top of the wall is at an elevation of 2631.6; the wall is about 5 feet high. The elevation of Wibaux Street directly west of the retaining wall is 2635.4, then the difference in elevation between the top of the retaining wall and the elevation of Wibaux Street, a point directly west of the retaining wall is 3.8 feet. The elevation of the floor in the Wagner store is 2635.9. As to the high-water marks of June 7, 1929, in the Wagner store,—well, it was pointed out by Mr. Wagner; he didn't have any marks on the wall or anything like that; I talked with Mr. Wagner in the store and he pointed it out. The elevation in the Wagner store on June 7, 1929, was 2640.1.

On the relief map there is a dotted black line commencing on the easterly side of the relief map and south of the Red Trail road, which line extends diagonally across a portion of the relief map so that it comes along on the northerly side of

(Testimony of John Oien.)

Esther Avenue extending into the creek bed and then running—turning at right angles and running directly across the foot bridge immediately to the east of the county bridge and extending on across Beaver Creek until it gets to a point in line, approximately in line or just north of the northerly side of Orgain Avenue, at which point the line turns at right angles and extends west in a straight line north of Orgain Avenue,—that is the property line [430] of the Northern Pacific. So that the ground on which the foot bridge, or at least half of the foot bridge, the Woodburn building so-called, the elevators, stockyards and all buildings contained therein,—all of the property referred to is located on Northern Pacific Railway Company land. And then the black line on the north side of the map, dotted, running across the entire length of the relief map and located four inches to the north of the railroad main line indicates the Northern Pacific Railway Company property line on the north side of the main line.

That is a depression in the ground,—my attention having been called to a depression on the southerly side of the railroad embankment between Wibaux or Main Street, and “C” Street,—the low mark immediately south of the railroad embankment.

(Recess until 1:30 P. M., March 31, 1934.)

Mr. McCARTHY: Mr. Maury, I don't know as I entered an exception \* to the refusal to put in the Government Army Report of Dyke.

(Testimony of John Oien.)

My attention having been directed to plaintiff's exhibit "1", with particular reference to the wall in the vicinity of the old Pierre Wibaux home as more particularly indicated or exhibited by the pencil mark, cross-mark, about half way between the figure of the man and the telephone pole pictured in the exhibit, I should estimate that  $2\frac{1}{2}$  to 3 feet of the wall is exposed above the water; the wall is 5 feet high. So that on that old picture then, the water is only half way up the wall, about.

Cross Examination:

Of course, in a photograph of that nature, where low land is covered with water, unless you get a wall or something to check by, you can't tell whether the water is six inches or six feet. As to how wide on the land to the south of the railroad fill the water stretched in exhibit "1", it was as far as I can see here on the picture. The width that it stretched in [431] feet,—knowing the land, having surveyed it and gone over it—oh, probably 700 or 800 feet; I couldn't tell exactly by the picture. I mean 700 or 800 feet wide. Designating on the model how wide I would place that water as shown in exhibit "1", it would run from the wall over to about in here——

Mr. McCARTHY: Running easterly to the elevator?

A. Yes; you can't see the elevators in the picture.



(Testimony of John Oien.)

I don't know whether the elevators were there at that time or not.

Q. Or if you indicated a line from one of the elevators, where it is now, northerly to a thing called the loading platform?

A. About that; yes, sir. That would be my view of about how wide.

During my direct examination, I spoke of an obstruction in the stream, appearing on the model, called a dam, about 300 feet south of the county bridge. Plaintiff's exhibit X-10 may be a picture of that obstruction, looking towards the north. As far as I can tell, where the man is standing in the picture is the obstruction that is portrayed.

Mr. MAURY: We offer in evidence X-10 (plaintiffs).

The COURT: Very well.

That was called the "manure dam"—by somebody. It is rock and dirt and stuff when it was covered; it was rock and dirt around the pipes.

Q. Mr. Oien, can you give us the elevation of the ground between Cramer's house and the next house to it, up here? Do you know where Cramer's house is located that was spoken of, Mr. Oien?

A. No, sir; I do not. I haven't the elevation of the land between that house (the house you are pointing to, called Cramer's) and the embankment here to the south. The closest elevation I have to that is down in here.

(Testimony of John Oien.)

Mr. MAURY: Indicating a corner of Olive Street and Drake Street. That would be your closest elevation?

A. Is this Trollope's house? [432]

Mr. COLTON: This is Ostby's, this is Sletten's and this is Trollope's.

I have no elevation right here (where you have pointed) or anywhere in that neighborhood. I should say, as I recall it, from this house at the corner of Drake and Olive towards these houses here to the southwest, that the ground is practically flat across there. As to whether I gave the elevations across there (where you are pointing), I got it for the contour map. I would have to go and look at that, to give you an approximate elevation here that was used for the contour map. I can—I will try—to produce the elevation of this Cramer house here or something close to it. I don't know where the Paulson house is,—that is described as the house that the man got up on the stove and put his children up on the oven.

Q. Right there. Mr. Colton is pointing to the Paulson house, which is identified. Can you give us an elevation on that, or close to it?

A. I can give you one close to it,—the intersection of "E" Street and First Avenue South? It is 2633.1.

Q. 2633?

A. Yes, sir. That would be 13 feet and point-one, above B. I would not be surprised if Mr. Lyman

(Testimony of John Oien.)

made that 11.1 above B, because of that difference we found in the bed of the stream, taken two years apart.

In taking a cross section at right angles to the stream at Massey's cow barn, I would find, if I had done that on June 7, 1929, much of the water running lengthwise with my cross section. I couldn't do that—that would take a lot of calculation, to give you some proportion of water between what would be running lengthwise and what would be running crosswise on my section there, if I had taken it June 7, 1929.

Q. What is the rate of fall from Massey's place to where you took the cross section, defendant's exhibit D-18, down by Mattie Miller's place \* difference in elevation? Can you give us the [433] rate of fall per mile?

A. (Witness figuring) Between the low-water surface at Massey's and the water surface at E Street it is 5.6 feet. The low-water surfaces there for the two were not taken the same day; they were two years apart. The fall of the creek bottom from Massey's to that point where I took the cross section, exhibit D-18, is 4.7 feet. The true difference then would be 4.7 feet in 4,000 feet around meanders there—well, whatever the distance is around the meanders; the true difference would be 4.7 if it is around or approximately 4,000 feet around the meanders from opposite Mattie Miller's to the cross section.



(Testimony of John Oien.)

Q. Now, what is the rate of fall from Mattie Miller's to the county bridge?

A. (Witness figuring) I haven't got the ground line on the county bridge here; it is on that section there.

Q. Is there some exhibit that would help you?

A. Yes; the First Avenue South exhibit (defendant's Y-4). Of course, under the county bridge, it is a deep pot-hole; I can take the water-elevation on the two points. Giving you the water-elevation on the two points there, that would be approximately 7 feet.

Q. 7 feet? And in what distance Mr. Oien?

A. It is probably about——

Q. 1750 feet around the meanders. Has that not been measured before? What distance would you assign on the meanders?

A. It would probably be 800 to 900 feet.

Q. Would you say by that that you intended to cross that big meander there Mr. Oien? I think that you gave me as 1750 feet once. I meant the cross-section, where you took the cross-section D-18?

A. That would be about right—1750, I think. The fall of the stream from the county bridge to the railroad bridge is about  $2\frac{1}{2}$  feet, in a distance of about 800 feet.

I said that under the county bridge there was a deep pot-hole; I think it was scoured out. As to when I first noticed that scouring under the pres-

(Testimony of John Oien.)

ent county bridge or under where the old county bridge was, it was when I took the cross section of First [434] Avenue South, and that was, with reference to June 7, 1929, in the fall of 1929, probably September or October sometime.

Q. And Mr. Oien, when a bridge is too short for a stream, does that scour—when it is too short for a stream, does that cause scouring?

Mr. McCARTHY: Objected to as not proper cross-examination.

Mr. MAURY: I will make Mr. Oien our witness.

The COURT: Very well; overrule the objection. Let him answer if he can.

Q. When a bridge is too short for a stream, does that cause scouring?

A. If the velocity is strong enough and the ground does scour, yes. That does cause scouring, if the velocity is strong.

Q. You spoke of this depression east of the old county bridge. You have made exact measurements of that, and using for the cross-section there—Did I mention measurements of the old county bridge as given by Mr. Baer?

Mr. McCARTHY: Objected to as containing something that Mr. Oien didn't say.

Mr. MAURY: I am asking him.

Mr. McCARTHY: No, you are not. You are putting the words into his mouth.

Mr. MAURY: This is cross examination.

(Testimony of John Oien.)

Mr. McCARTHY: It is an improper question. It is three questions in one, Mr. Oien did not say.

The COURT: It assumes a state of facts he didn't testify to. Ask him about it.

Q. Is there a depression east of the old county bridge for a distance of 700 or 800 feet?

A. There is a sag in the road there. As to whether I measured that sag with reference to the floor of the old county bridge, will state that the old county bridge was washed out at that time. I assumed where the old county bridge was; vestiges left on the ground—one of the abutments—[435] caused me to make that assumption. Using that, I measured a depression from the floor of that bridge along the road going to the east as it existed in the early fall of 1929. I never figured the area of that section separately, using as the hypotenuse a line drawn from the top of the floor of the old county bridge.

Q. What are the dimensions? You have it on exhibit Y-4 there. What are the dimensions of that? May I ask? Are these (the black ones) your figures right there?

A. No, sir. If you would give me the points Mr. Maury. Point them out.

Q. Yes. We start at the bridge here. Get in front of the jury; that is the best way to let them know what we are driving at. What is the area between or beneath the black line drawn to the east from the county bridge and the white line beneath it? Have you figured that?



(Testimony of John Oien.)

A. It is marked here—2230 square feet. The distance between the black line and the white line underneath it at the point right where the arrow points down from the word “elevation” (this one here), is 3.2 feet. The lower white line is the surface of the road as it went across there,—not exactly the lower white line—the one next to the black line.

Q. Yes, the other lower white line is much—the white line that we just spoke of goes on top of the road and all those culverts there Mr. Oien?

A. Yes, sir.

#### Redirect Examination

Having been shown defendant's exhibits D-19, D-20, D-21, and D-22, and asked whether I recognize the scenes portrayed in those pictures,—I recognize this one (D-19); I recognize D-21; and I recognize the scene portrayed in D-22.

Q. And there is no particular object with which you can check defendant's D-20?

Mr. MAURY: Yes; those are various photographs of the manure dam.

Mr. McCARTHY: Of the city dam. [436]

Q. Your attention which has been directed to pictures of the so-called city dam, which Maury calls a manure dam, are the ones which you said had rock and manure on?

A. Yes, sir; they are. They are just larger pictures than the ones that were in evidence.

(Testimony of John Oien.)

Mr. McCARTHY: Defendant's D-19, D-20, D-21 and D-22 are offered in evidence.

Mr. MAURY: No objection.

The COURT: They may be received.

My attention having been called to defendant's exhibit Y-4, there is marked on here the approximate area between the points A and B; the figure given as that area is 920 square feet. And there is given also in black figures, area 2230 square feet; that latter area, the 2230 square feet, relates to the area of the cross section between the points C and D. Adding the two together so that we will have in the record the area of the cross section A to B, plus C to D, it is 3150 square feet.

I have numerous times in the course of my testimony given elevations, all of which were preceded by the figure 26—that is, 2630, 2635, 2640, and so forth,—I was referring to sea-level datum; it is “2640” feet above sea-level for instance. Wibaux is 2600 feet above sea-level, and then some; so then I take the latter two figures to make my comparison; it is 2600-plus in all cases. So that, when I say 2635 and then give another elevation, 2634 or 2638,—to get the difference in elevation I just subtract the smaller last two figures from the larger last two figures.

#### Recross Examination:

I usually deduct 2620 from my figures to get the difference in elevation from the point under the bridge.

(Testimony of John Oien.)

Redirect Examination:

That datum point is located,—2620 is right under the bridge. [437]

Recross Examination:

As to whether Nick Wagner's place of business is downstream or upstream from the county bridge,—his place is right in here (indicating). His floor was the same elevation as the floor of the old county bridge.

Q. His floor was on the elevation of the old county bridge?

A. Approximately, yes. His floor is almost exactly one foot above the street. [438]

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M. F. CLEMENTS,

being first duly sworn as a witness on behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is M. F. Clements. I live at St. Paul, and I am with the Northern Pacific Railway, with the title of Bridge Engineer. I graduated from the University of Iowa in 1899; took a general engineering course. In regard to my experience as an engineer and what specialty of engineering I have followed, the first position I held after leaving school was in Washington, D. C., as a draftsman



(Testimony of M. F. Clements.)

in Civil Service, working for the United States Government. While I was there, I did take an additional year's work in night school, in George Washington University. After leaving there, I worked for the Burlington, Cedar Rapids and Northern Railway as assistant engineer on maintenance of way. That railroad was absorbed by the Rock Island in 1902. I continued with the Chicago, Rock Island and Pacific. For one year I was in maintenance of way work and then followed with two years of designing of bridges in the office of the Bridge Engineer. Later, I went to a field position as assistant division engineer at Cedar Rapids, Iowa. I continued there until 1906. Then I became engineer for the Clinton Bridge & Iron Works. Was there eighteen months, and I came to the Northern Pacific Railway; that was in August 1907. I have been with the Northern Pacific ever since. For about ten years I was on bridge construction; for a few months—for six months—I was on designing of bridges in the office of the Bridge Engineer; and since November, 1917, I have been Bridge Engineer. During the time I was in the field I lived at Superior, Wisconsin; Duluth, Minnesota; Glendive, Montana; Missoula, or Bonner, which is near Missoula; and Spokane, Olympia, Tacoma, Portland, Vancouver, Washington; Seattle; and I was in camp in a number of places in construction work. Practically all [439] of this was in construction of bridges. Perhaps, with some ex-

(Testimony of M. F. Clements.)

ceptions,—one season when I was on some rock work, and tunnels,—practically all of it was bridge construction.

Defining some of these terms we have used here, such as “bridge” and “viaduct”: in our bridge records, all structures that carry, that is, over a road or over a gulch, or over a stream that carries water, we designate—they carry a bridge number, designating each one by a number, which is taken from the mile-post. For instance, Beaver Creek is bridge number 184. That means it is the first bridge in the mile 184; that is 184 miles from Mandan. The next bridge takes 184.1 and the next bridge would be 184.2. Beaver Creek bridge is number 184; Wibaux Street bridge is 184.1; the highschool subway is 184.2. So our bridge record calls those bridges. Now, a structure which may be over a gulch which carries a little water, but which is placed there to eliminate grade or high embankments, we would speak of as a viaduct; and other designations, for instance, if a bridge was over a road or street, we designate that as an undercrossing, having reference to the street; or if the highway or street went over, an overcrossing. Speaking from a railroad standpoint, a culvert is an opening to carry water under the track, which is entirely closed at the top and has filling material over it, where the track structure between the rails and ties has some filling between the culvert opening of the culvert opening of the structure and the tie. A bridge would be

(Testimony of M. F. Clements.)

an open deck structure where the ties are carried directly upon the bridge structure. Reference has been made to a chapter in Webb on Railroad Engineering, which chapter was entitled "Culverts and Minor Bridges." A minor bridge is one which would provide an opening for water from a drainage area of an equal amount. For instance, the Northern Pacific Railway has standard plans of culverts, pipe culverts,—concrete boxes, wooden boxes and wooden culverts. The maximum [440] size of culvert plan we have is a 10 x 10 box, which is about 100 square feet. Supposing an embankment is six feet high, it wouldn't be possible to build a 10 x 10 box, and if we require 100 square feet of area in that culvert, we might put in a bridge. For instance, if we had a 100-foot bridge, beams and steel bridge, the depth of the floor of that bridge would be between two and three feet,—say an I-beam would have a depth of three feet; we would have three feet below; thirty feet long would be ninety square feet. That would be the same opening as the 10 x 10 box, or culvert-box. That is, there is a bridge that carries the same amount of water that a culvert would carry. Getting beyond that, you would have a bridge of major size as compared with a minor bridge. I was acquainted with the bridge over Beaver Creek that was in place there for some years prior to the flood of June 7, 1929. That is not a minor bridge; that would be a major bridge.



(Testimony of M. F. Clements.)

In addition to my work for the Northern Pacific, I have for a period of six or seven years been a consulting engineer for contractors and others occasionally, on bridge engineering—bridge construction. I had some connection with the bridge out at San Francisco or Oakland, California, that is quite an engineering feat; I designed the foundations for the Suisun Bay bridge, now called the Martinez-Benicia. It is a bridge that there is about sixty feet of water and went to a depth of 140 feet, and it is the deepest foundation that has been put down. That bridge was constructed in 1929. That bridge over the Mississippi at New Orleans is under construction now, and I designed the foundations for that. The foundations of the Mississippi River bridge is built after methods which I originated.

As to whether there is kept in my office at St. Paul the records of the various bridges, will state that it has been maintained in the Chief Engineer's office, combined record since 1891, and the same is maintained today. I have caused photostat [441] copies of those records to be made insofar as they relate to the bridge over Beaver Creek. Having examined defendant's exhibits D-23 and D-24, will state that those are photostatic copies of the records of the Northern Pacific, insofar as the bridge over Beaver Creek is concerned. These are what we use as a double page, as they appear in the book—one following the other. I notice in the upper corner here, the printer's record there that this

(Testimony of M. F. Clements.)

form was made the 13th of March, 1891. That has been maintained from that day to this.

Mr. McCARTHY: Defendant's exhibits D-23 and D-24 are offered in evidence. It will take a little time. May I assume they will be in evidence? From the records, Mr. Clements has prepared certain models that we could start unpacking here.

Mr. MAURY: I think we can save more time than that. Mr. Lyman says they may be admitted.

As to the exhibits received in evidence here (D-23 and D-24) I had prepared under my supervision, models of the bridges over Beaver Creek from the time the railroad was built, on up to the time the bridge was built and in place there at the time of the flood of June, 1929. I have those models here. I am prepared to set them up. (Five-minute recess.)

The various parts of the models are numbered or labeled. I will set up the bridges, explaining to the jury as I go along, what was done there, and in my setting up, will then call off for the record, the various parts of the models as they are labeled. The first model I put up represents the bridge that was first constructed over Beaver Creek at Wibaux; it was built in 1880, and the model is made on a scale of four feet equals one inch. If we were to take a section directly across the roadbed at the east end of the Beaver Creek bridge, and another at the west end. One inch on the model represents four feet in actual construction. [442] The bridge is just the same as if I would cut a

(Testimony of M. F. Clements.)

cross-section across the roadbed and was up and down stream. The portion at the end represents the section cut across the embankment, and the slope on the embankment, as it appears on either side and directly in front of the bridge. Now, the two sections are together and extending on the east end, here is a mark on here "east end", and then at the location of each support or bent there is a number called pile bent number 2,—1 being at the abutment,—2, 3, 4, 5, 6, 7, 8 and 9, and then the west abutment. Those are the slots for the pile bent; the slots are numbered in the manner I have indicated, and also each pile bent that goes into it. This bridge was built with four piles in each bent, with sway bracing, on which was built 3 x 10 plank and on top was placed a cap. These piles were driven one at a time, developing a certain carrying capacity for the load that goes on top of it. They are cut off to a level and on top was placed a timber 12 x 12 inches x 14 feet long. Now, each bent is built up in that manner. I might say that the reason for this type of bridge is that each individual member is comparatively light in weight and can be hauled on a wagon. The equipment that is used in the construction of this bridge—the heaviest would be the pile-driver, and that can be hauled. In the construction of this type of bridge,—outside of the pile-driver, is designed nothing but hand-tools. So, it is convenient in the construction of a bridge, where the material has to be hauled long distances, in the building of a railroad.



(Testimony of M. F. Clements.)

Now, that represents the first part of the bridge. I am now duplicating construction conditions when the railroad first came through eastern Montana; in 1880, this type of bridge at Beaver Creek was built. The first track was laid over it in the spring of 1881—along in May. Now, after the bents are in place, what we call stringers are placed on top of that, and then ties across the stringers. These (models of piles and ties) are made up in [443] sections simply for the convenience of putting them together. Now, that represents the bridge that was built in 1880.

Now, after the track had been constructed through to the West Coast so the trains could be operated and long timbers could be obtained in the timber country, there was a section of this bridge removed and what we call a Howe truss span——

Mr. MAURY: Q. You are taking all that from these records,—your translation of these records. You are now giving your translation of exhibit D-24 and exhibit D-23?

A. Yes, sir. That is my translation and I am now giving my translation.

Q. These records are very occult to a layman?

A. That is what I am telling here.

Q. You weren't there. You are giving your interpretation and translation of these records—these exhibits to which I have called attention?

A. Yes, sir.

There were removed three bents in the center of the bridge (witness removed three bents). What

(Testimony of M. F. Clements.)

I have put on there is what we call a pile-and-timber pier. This last section I have put in is what we call the Pony Howe Truss; it had a span-length of 44 feet. As to whether the Howe truss span was a solid piece of material such as that indicates, the lines on the side represent where the members were. The total sections of timber were full-length, 44 or 45 feet long. As I say, this pan was not built until after the bridge was completed, because the long timbers had to be hauled by train from the Coast. That was the bridge as existed in 1884,—four years later. That was put in to provide a wider channel over the stream to eliminate the accumulation of drift and other material that might come down.

Now, then in 1893, there is a record of high-water shown on the diagram of 7.3 below the base of rail. Now, that high-water mark is represented by a yellow wire. That was the highest water [444] up until 1893. The bridge was first built in 1880; that was the first record of any high water.

In 1896, this bridge was replaced by what we call a permanent structure.

Mr. MAURY: Q. Before passing to that, how long was this bridge, Mr. Clements?

A. That bridge was 137 feet long.

On these bases—two of them—there is a mark at right angles to the line of the track on each section; and those are match-marks so that the base of one could be moved past the other. The reason

(Testimony of M. F. Clements.)

for that is that the two bridges were not placed exactly opposite each other. (Witness assembling bridge, abutments and piers). I am inserting what we call a pile-pier down in the slopes at this time,—well, call it pile abutment. Pointing out the distinction in the material used in the abutments and the material used in the piers,—this consisted of a central span 70 feet long; that is, 70 feet from center to center of bearing; and at each end was a 20-foot span, although overall-length was about 21 feet and overall-length was around  $71\frac{1}{2}$  feet. 20-foot designation means center to center of bearing. Now, they are supported on the east end and west end by pile piers, that is, piles were driven—three rows of piles—and they were to take the bearing of a steel span. The two piers were concrete, painted gray; they are concrete. And the black portion is the steel, covered by the ties. That was the bridge built in 1896. As to how the bridge of 1896 and the bridge that was in place prior to that time compared in height, will state that the 1896-bridge, or the track, was raised  $3\frac{1}{2}$  feet. The reason for that was that the depth of the steel girder was greater than the depth from the floor to the clearance-line of the truss, or timber, bridge; and in placing the steel bridge, the bottom of the main girder was made to the same elevation as the bottom of the Howe truss. That accounts for that  $3\frac{1}{2}$ -foot [445] raise,—to provide the same waterway. Now, at the end of the bridge, there



(Testimony of M. F. Clements.)

was a slope on either side that extended in front of the abutment for the reason that there was no wings or other provision made, to retain the slope, and the spans at the end, we designate as slope-spans. The 70-foot span was put in to take the water, but with this type of construction permitting the slope to run around the abutment; it provides additional waterway, simply giving a little increase or leeway on the provision for waterway.

Now, in designing a steel bridge, we take into consideration requirements for a longer time than we would for a timber bridge, because a timber bridge is more or less flexible,—it could be shortened or extended without any difficulty. So, in determining the length of a bridge—its length—we take into consideration all the information that is available, and what is considered the best of all is the record of water that has come to this bridge——

Mr. MAURY: We suggest that that kind of evidence be introduced by question and answer.

Q. I wish, in addition to showing it to the jury, that you comment on it and explain it as we go along——

The COURT: I think so. Can the jury hear? Can you understand clearly what the witness is saying?

Mr. McCARTHY: Anything that isn't clear in the presentation, let them ask Mr. Clements.

Now, the water coming through the Howe truss trestle, water comes in to the piles and around and

(Testimony of M. F. Clements.)

is deflected sideways. So, we consider this in determining the area of the opening available for water, that this pile bent takes out of the opening about three feet.

Q. Now, explain to the court and jury at this point, Mr. Clements, what some of the factors are that you or any bridge engineer, take [446] into consideration in designing a bridge, in determining its size? That is, if you were given the problem of designing a bridge to go over a stream, what are the factors that you would take into consideration, that is, when you came to a bridge, particularly of a permanent character?

A. In the first place, any bridge is designed to carry the load that is to cross it—the locomotive being the heaviest load; and we always look to the future in the designing of any permanent bridge, assuming the weight of a locomotive is greater—oh, 50 to 75% greater than existing locomotives, and also in the assumption of unit stress and design, we consider figures to allow for any increase. And after determining on the type of structure, we take into consideration the source of the water that is going through this bridge, and its location,—whether it is in a country where there is heavy rainfall and whether it is in a country that is subject to acute storms of short duration, and at this territory, it is subject to cloudbursts. The rainfall around Beaver Creek is around fifteen inches a year. On the West Coast we have sixty inches a

(Testimony of M. F. Clements.)

year, and in eastern Washington it is eight inches a year, and the St. Paul country twenty-four inches. But the section where we have sixty inches of rainfall may not be any worse than the one at Wibaux, where we have fifteen inches, because of the acute storms which this country is subject to. So, that is taken into consideration. And we take into consideration the size of the drainage area, the condition of the soil, the material—the ground directly underneath the bridge, as to what velocity of water could be permitted to go through there; or take into consideration every factor that enters into the maintenance of this bridge as a permanent structure.

Now, I started to describe a moment ago what we considered the area of waterway in the pile trestle bridge. Now, assuming the steel bridge, with its long span in the center, comparing [447] them on the basis I have mentioned here, the steel bridge will carry 22% more water than the timber bridge. As to why that is: although, the length of it is only 114 feet and the length of this timber bridge was 137,—as I explained a while ago, taking into consideration the area that is left here available to carry water, I have deducted three feet for each pile bent.

Q. What would be the effect if the pile trestle bridge was in place and you got some high water coming down that, carrying with it debris of various kinds, including pig pens, trees, chicken-coops and outbuildings of that character?



(Testimony of M. F. Clements.)

A. Well, the piles being close together—the standard length of the span at the time this was built, was sixteen feet from center to center of the various bents. The comparison that I make as to the efficiency between the two bridges,—I stated the steel bridge would carry 22% more water than the timber, although the steel bridge is 114 feet long and the timber bridge is 136 feet long.

Proceeding with any construction work: well, in 1898, the Northern Pacific reduced the grade on Beaver Hill, which was west of this point a few miles, and this bridge was located in a sag so far as the railroad was concerned, and the material from the top of the hill was placed in the embankment at either end of the bridge and the bridge was raised a little over five feet. \* Now, in raising the bridge, the timber abutments were simply blocked up; the piers were actually raised by adding to the concrete. The abutments were still of timber construction at that stage. The spans were raised, so there was no change in them.

Now, that shows the bridge as it was in 1898. I changed these blocks on the end as representing the slope, for the reason that the slope span was originally designed to take a flatter slope than what would be required for a five-foot higher elevation. The original bridge was about sixteen feet high; the slopes are con- [448] structed  $1\frac{1}{2}$  to 1, that is, for each foot of vertical height, it come out  $\frac{1}{2}$  foot.

(Testimony of M. F. Clements.)

Q. Before you raised that bridge, did you want to indicate—maybe you did or maybe you didn't—I don't know,—any high-water marks?

A. I didn't; I can. (Witness placing wires on side). That was the high-water of 1893 and also 1897,—which was the same elevation as the high-water on the old bridge. That is, this bridge, as I had it before I raised it, was built in 1896, and there was a high-water in 1897, but it was the same elevation above sea-level as the high-water of 1893, so that is what I assumed. Now, these slopes I was speaking of, there was a slope of  $1\frac{1}{2}$  to 1 on either side, but the slope—really, the bridge was about sixteen feet high, and  $1\frac{1}{2}$  times that is about twenty-four feet, or it would require twenty-four feet. As a matter of fact, the span is almost twenty-two feet, and then the block that was across the end here provided for the remaining distance.

Q. Can you detail any more fully the slope and the degree of slope that you used? Can you interpret it any more closer or more fully? In general,—that one in particular? It is more a question of explaining the terms that you used.

A. A material like earth, or any rock or earth, or any material that is used, will have what is known as the “angle of repose”, or the slope at which the material would just begin to slide. Now, in building a railroad embankment of earth, we use a slope that is slightly flatter to prevent the slide, and  $1\frac{1}{2}$  to 1 is the slope at which earth will

(Testimony of M. F. Clements.)

not slide; that is the slope used in constructing a railroad embankment. I stated here in making the five feet, it really made it too short. But rock will stand on a steeper slope, so rock was placed on this slope when it was raised in 1898. Around the end of an embankment, it is customary to place riprap. It is usually stone of a size of one or two-man rock,—what one man can lift, and two men can lift; that was [449] dumped around the edge of the slope, but it was higher to provide a steeper slope when this was raised, for the reason that the earth would not stand on a steep slope; that was required for the five-foot raise. Now, this was the bridge as it was built in 1898——

Mr. MAURY: Can't that be left there for cross-examination?

Mr. McCARTHY: He has got another change to make; he is only down to 1898 now; he can put it back.

Q. What are you now putting in, in gray color, at the ends?

A. In 1903, the timber abutments that were in the position I had them were removed and concrete abutments were built. You notice that there is a wing on each end. As the bridge was originally constructed in the lower position, those wings would not have been necessary for the reason that the slope would have extended from a point higher up, but on account of the raising of the bridge, it was necessary to put in the slope, so that the slope



(Testimony of M. F. Clements.)

of the material could come at a lower elevation,—the abutments built at each end. The brown-colored pieces that I referred to as the slope at either end, surrounding the abutments, was earth or dirt of some kind; that is the embankment; these blocks are simply to cover up a hole there,—in the making of this; that is to get them over the footing of the concrete.

Mr. McCARTHY: While you are fixing that, the jurymen may be interested in seeing a section of the slope of the model. (Handing to jurors).

When this was constructed in 1903, the slope started from the wing of the abutment, and was at a steeper slope than the one at the side made out of loose rock, which would stand on a steeper slope. That is the bridge that existed in 1929,—on June 7, 1929. After that was built, the permanent abutments were put in and the bridge raised to the height I have indicated; then that bridge remained in place and was in place, on the day of the flood.

Q. Now, you gave your opinion before, of the bridge as compared [450] to the timber trestle bridge in efficiency, and made a comparison in efficiency, and gave your conclusions in percentages,—I think you gave a difference in efficiency of 22%. Now, was the bridge raised after you made the comparison and gave the 22%?

A. I gave that comparison,—it really referred to a high-water of 1893 and 1897, which was the same elevation, which was,—the efficiency below that high-water mark.

(Testimony of M. F. Clements.)

Q. Will you compare the model which you have set up there, with the Howe truss span that is in place, and the bridge that was in place in June, 1929, in efficiency? How did they compare in efficiency, in your opinion, so far as carrying off water is concerned?

A. Well, I stated that was below high water mark of 1897 and 1893. If you compare them on that same mark, there is no greater capacity for the bridge. \* Of these two bridges, the steel bridge would take care of the most water, in my opinion. As to a comparison of the bridge that was in place in June, 1929, and the bridge with the Howe truss span in place, in percentages, so far as efficiency, I can't give you the exact amount, but I would say more than double; it would increase it 100%. I placed a second wire on here, which represents the high-water of 1921, and which—and when I say that “increase”, probably I better say below the high-water of 1921 that I think it would be 100%. Now, there was still another high-water mark,—the one that isn't on yet,—and that was 2.8 feet below the top of the tie; that is about right (placing wire). As to the number of yellow wires I now have showing on the bridge that was in place in June, 1929,—the lower one represents the high-water of 1893 and 1897; the middle one represents high-water of 1921, and the upper one represents the high-water of 1929. At the beginning, I called attention to lines which were on the sections of the

(Testimony of M. F. Clements.)

two bases as being a match-mark. That was placed in that way to represent the relative position of the two bridges; that is, the steel bridge was [451] about ten or twelve,—maybe fifteen,—feet; about fifteen feet east of the original bridge.

There is only one thing I would like to say about this concrete dam. At the same time that these concrete abutments were built in 1903, there was built a concrete dam, shown on the relief map; the position is something like I have shown with that line. I placed a wire on the base of these models, which is something near the location of the dam; there was a wing on this side, on the east end, extending over to the embankment,—that is on the west end,—no.

Mr. MAURY: Have you got them marked east and west end?

A. This is east; that would be on this side; this wire should be placed there to mark the location of the dam, but there was a wing there extending over to the railroad embankment.

Mr. MAURY: I think that would be better by an arrow of which is north and which is south, and which is upstream and which is downstream,—rather than east and west, because the stream is flowing north and south. Which is the downstream side now? Which is that? Is that upstream?

A. No.

Q. That is north.

The concrete dam was in a position not quite parallel with the railroad; it was a little farther



(Testimony of M. F. Clements.)

away on the east end, and there was a wing from the concrete dam extending over to the railroad embankment. At the east end, it extended into the embankment as a straight wall, (I am pointing to the relief map now). The wing on the west end, the dam parallel with the track, or very nearly so, and stopped in the bank, which was the north bank of a small stream which extends from the east and flows along the north side of the railroad. That stream is about six miles long, originates up near the station called Yates. Now, the water from this stream along the north side flowed into this dam—above the dam—[452] so that the dam itself extended straight into the embankment which was the north bank of the small stream. In 1903, there was a freshet came along and took out some of the earth. During a freshet, the water got around the end of the concrete dam and two years later a wing was built across to the railroad embankment, and the entire dam was raised two feet in height. As I said, the water from this small stream on the north side flowed inside and supplied water for this reservoir that was created for the building of this dam. Over on the east end of the bridge there was a water tank. That was built——

Mr. MAURY: There was one at the west end; that was in 1912.

This is in 1903; it was at the east end,—built just outside of the dam. The dam was first constructed in 1903, twenty-three years after the con-

(Testimony of M. F. Clements.)

struction of the railroad. (Witness goes to witness chair).

I have computed the area underneath the bridge in which water might flow,—the bridge which was in place in June, 1929. As to the area in square feet, of the waterway opening under the bridge that was in place in June, 1929,—for the entire bridge, the approach spans above its slope, and the 70-foot span above its center, above the channel, there is about 1350 or -70 feet.

I have been up and down Beaver Creek and up and down that valley. I have heard all of the evidence,—at least, since the defendant has been putting in its side of this case.

Q. From your study of bridge records and your knowledge of Beaver Creek that you have testified to here, with reference to your work as District Engineer, or whatever your position was at Glendive, are you able to form an opinion as to whether the bridge over Beaver Creek, prior to the flood of June 7, 1929, provided an adequate opening for Beaver Creek? Can you form an opinion?

A. I can; yes, sir. [453]

Q. What is your opinion?

A. I consider the bridge was ample to carry any water previous to the 1929 flood. Stating the reasons on which I base my conclusion: The highest water previous to that date was 1921, and there was no damage to the bridge in 1921; and the water was not raised to an elevation that would particularly cause damage to adjacent property.

(Testimony of M. F. Clements.)

Q. Mr. Clements, there has been a suggestion made here during the presentation of the plaintiff's case, that certain formulas or formulae could be used to determine the size of a bridge, such as is required to carry the railroad over Beaver Creek. What comment, if any, have you to make with reference to the application of any formulae as a guide for the construction of such a structure?

A. Well, I will say this, that I have been working on bridges and culverts for about thirty-five or thirty-six years, along there. That is a longer time than some of these formulas have been in existence, —a longer time than some of these formulas have even been presented; that is a longer time than even Professor Talbot—I am personally acquainted with Professor Talbot; I have used his formula for spirals for curves. Practically all these formulas are prepared by teachers of engineering in schools and they have been made from collection of data from men who have had experience. But they are not original with the men who present them, although they take their name many times; they are all empirical formulas; they are not developed from scientific data; they are an accumulation of actual data. And some special mathematical curve,—Myers' formula being a parabolic curve; they are a substitution of some theoretical curve for some actual data. That is the way most empirical formulas are made anyway. And any drainage area formula can only be applied to a drainage area that



(Testimony of M. F. Clements.)

is covered by a single storm; otherwise, you [454] can't make comparisons, and they are used only for culverts in forming an opinion; they are not accurate. Every formula will have coefficients which will make a variation of from 1 to 4 in Myers' formula, or 1 to 6 in Talbot's, and there might be 1 to 6 variation. So, when you come down to the actual size of culvert needed, you might guess at it, in applying the Meyers' formula, if the area is less in size than the second storm—that could not be applied to Beaver Creek. If you applied it to Beaver Creek Valley, you might obtain a value that was ten times the amount of water that came down Beaver Creek Valley at this time, by application of different coefficients. Formulas are used only to form an opinion in designing culverts for small drainage areas—even as to culverts. We don't adopt a culvert as a standard size, as developed from a formula. I have tried to develop a formula on the Northern Pacific Railway. The whole Northern Pacific Railway covers territory that has zones that have entirely different rainfall and entirely different conditions. So, you might guess at the culvert at the beginning. And another thing—we have standard culverts. Talbot's formula will give greater sizes on the small areas, and above a certain size, the Myers' formula will give the larger. Now, we use a minimum size, so the Talbot's formula would not be for us anyway, and we get a larger size than from what could be determined from a formula.

(Testimony of M. F. Clements.)

Q. Mr. Clements, directing your attention to the Montana statute, can you form an opinion as to whether or not the bridge over Beaver Creek, as constructed over Beaver Creek, with the slopes in the manner you described partially filled, and still leaving partial waterway, as you described in the evidence, result in the restoration of the Beaver Creek watercourse to its former state of usefulness, as near as may be?

Mr. MAURY: We object. The Court determines the Montana law; we do not permit Mr. Clements to invade this [455] field. That is a question for the Court to give instructions on as to the law, and for the jury to pass upon the fact; also, it is asking Mr. Clements to instruct the jury as to the law.

Mr. McCARTHY: We are merely asking him his opinion,—first, whether he has an opinion.

The COURT: I suppose he could got to the extent of saying whether he had the Montana statute in mind, and attempted to comply with it. Of course, it would be for the jury to say whether he did or not, as a matter of fact.

Q. Mr. Clements, the Montana statute with reference to bridges over streams, constructed by railroad companies, such as was done here at Wibaux, in substance, requires that the stream be restored to its former state of usefulness as near as may be.

Q. Having in contemplation a safe bridge now, can you form an opinion as to whether or not

(Testimony of M. F. Clements.)

the bridge over Beaver Creek that was in place in June, 1929, met the requirements of the statute?

Mr. MAURY: We must object. Mr. Clements has shown himself at all familiar——

The COURT: I will sustain the objection without any further argument. I don't know that Mr. Clements built this bridge. Did Mr. Clements build this bridge?

Mr. MAURY: No. Mr. Clements is a younger man than I am; it was built in 1883.

The COURT: As an expert, let him testify as to what was done towards compliance with the law, towards restoring the stream to its former usefulness, as near as may be.

Q. You heard the suggestion of the Court, which I adopt. Will you please answer it?

Mr. MAURY: We still reserve our objection.  
[456]

The COURT: Very well. Note an exception. He may answer the question as I have suggested.

A. My interpretation would be as to its carrying capacity of the water, and I think I am qualified to answer on that, that it would.

Q. All right, give us your opinion.

A. My opinion was, it would carry the water as well as it would, had there been no railroad there.

Mr. W. L. Darling was chief engineer of the Northern Pacific Railway Company, or its predecessor, the Northern Pacific Railroad Company, when the bridge was built—as it was finally placed there;



(Testimony of M. F. Clements.)

in 1896 was when the permanent bridge was first built.

Q. Will you tell us what the reputation of W. L. Darling was as an engineer?

Mr. MAURY: We object to the reputation of W. L. Darling or anybody else, when the testimony of all—the plaintiff and the defendant—shows that the bridge was not built according to the laws of the State of Montana; that the bridge is only 65 feet long——

The COURT: That is a matter of argument.

Mr. MAURY: That is a matter of stating our position in the record at this time, and preserving our record,—because this Court is different from the State Court, and we must preserve our record here, and preserve our exceptions. Where it has been said in all the testimony, that the bridge was only 65 feet long and that between the banks of the stream it was 175 feet at the nearest point,—that the defendant's engineers assigns to it,—and at the nearest point above that, that it was 150 feet——

The COURT: I think that is a matter of argument. What [457] is your objection?

Mr. MAURY: My objection is, that when the evidence is before the Court, it is not allowable for any defense to be made about whether they had any expert engineers or not.

Mr. McCARTHY: Our position is that the railroad used reasonable and ordinary care to get a man to supervise the——

(Testimony of M. F. Clements.)

The COURT: It is a matter of argument, whether you have done it or not. What is your objection to his testifying as to the reputation of W. L. Darling? Make your objection clear.

Mr. MAURY: The objection is that it is not justification for breach of law by hiring men of reputation to do a thing; that acts that they do must speak for themselves. In argument of that objection, the only State that permits that is Pennsylvania, and every other State Court, and the Federal Courts, hold——

The COURT: I still insist that you are now making an argument that you will hereafter state to this jury instead of making an objection that you will make to this testimony. If you will make an objection to it, I might sustain it.

Mr. MAURY: I object on the ground that the reputation of the builder of a bridge is not a matter properly in issue in this case,—or legally in issue; that the question is, what was the work? Not what the reputation of the man who made it was.

The COURT: Well, if W. L. Darling were here, present in this courtroom, you could question him as to his qualifications,—his schools, qualifications and experience. I will overrule the objection; you may answer. [458]

Mr. MAURY: Exception.

Q. Will you tell us the reputation of W. L. Darling as an engineer?

(Testimony of M. F. Clements.)

A. He was considered one of the best construction and locating engineers in the United States.

Q. At the time the bridge in question was built, who, under Mr. Darling, occupied the position under him, as you do now, as bridge engineer, if you do?

A. Mr. K. Hildegard.

I have seen Mr. Hildegard on two occasions. I am familiar with his reputation as a bridge engineer. The bridge in question was designed by Mr. Hildegard, or men working under his direction. Mr. Darling was the chief engineer, and under him, in specific charge as bridge engineer, in bridge construction, was Mr. Hildegard.

Q. Will you tell us what the reputation of Mr. Hildegard is, or was, as a bridge engineer?

Mr. MAURY: We make our same objection.

The COURT: Overruled.

Mr. MAURY: Exception.

A. Mr. Hildegard is a graduate of a university in Switzerland. He was bridge engineer for about eight or ten years, and I have had occasion—I will say this: it is a bridge engineer's duty to bring in two principal things—first, in the designing of bridges and then——

The COURT: Just answer the question.

Q. Just tell us what his reputation was Mr. Clements?

A. It was good; first-class. He is alive now. He is living in Switzerland.

Having been shown plaintiff's exhibit "26", this is the same profile map that was referred to by the



(Testimony of M. F. Clements.)

witness Lyman, during his testimony. I can find on that profile the location of the bridge over Beaver Creek, at Wibaux; it is shown on this profile. It has been testified to in substance, by Mr. Lyman, that the banks of [459] Beaver Creek at Wibaux, were 600 feet apart, as disclosed by that profile. I do not agree with that statement; the profile does not show any banks at all, of Beaver Creek, in the vicinity of the bridge. Explaining to the court and jury on what I base my conclusion and where my disagreement with Mr. Lyman comes in: this profile is a copy of the Northern Pacific profile, and from what I know of the records, it shows on here several elevations, or several lines representing the track, (witness pointing out to jury). This profile—now, this is made in two different scales—the vertical scale 20 feet equals one inch, and the horizontal scale, 400 feet equals one inch; if they were on a natural scale, this would have to be twenty times as long. On the profile here is shown various lines which represent the grade of the track. Those several lines on here represent the grade of the track and of different elevations, due to the raising of the grade of the track at the time this bridge was changed. Now, it shows the 1880 elevation, the 1898 and at the time the bridge was constructed, it was raised  $3\frac{1}{2}$  feet and then 5 feet; and since 1929, it has been raised another 5 feet. I am not sure whether this shows—anyway, we are speaking of the ground-line; this lower zigzag

(Testimony of M. F. Clements.)

line represents elevations at various points along the railroad at the time the railroad was constructed in 1880. This profile was made in 1903, but it is always the custom in transferring to a new profile, to copy the old ground-line; that is the 1880 ground-line. Now, there has been referred to by Mr. Lyman, some banks of the stream, referring to this point 01 and 02, where there is a break in the line—vertical break—Mr. Lyman interpreted those to be banks of Beaver Creek. I say those are not the banks of Beaver Creek.

Q. Can you illustrate what you pointed out on the profile exhibit, plaintiff's exhibit 26, any more clearly on the relief map, Mr. Clements? [460]

Mr. MAURY: Q. You say those are not the banks,—are not the banks of Beaver Creek, from 01 to 02. You say that?

A. That is what I said.

Q. If I may interrupt, what are they?

A. I can explain that on this relief map. This map represents Beaver Creek coming down, following this blue line,—coming down to the Beaver Creek bridge at this point. I find marked on this map, "Possum Hollow", which is another waterway coming down there, and that drainage area extends up there about three miles; and on the north side of the railroad is another small stream follows down and empties into Beaver Creek north of the bridge, and this waterway extended almost up to Yates, about six miles. Now, at every point up this

(Testimony of M. F. Clements.)

stream, as I could observe, where you find a junction of two or three streams, there is a natural basin formed, or lake, you might call it, or pond. This stream, in following down the zigzag course, cuts on the outside of the curve, silts up on the inside,—there is a wider section at each curve. This stream curves around, make a curve between the highway bridge and the railway bridge, and there is formed in here a natural reservoir,—in below here—that existed before the railroad did. At one time, it followed closer to Wibaux Street—this is Wibaux Street. And at First Avenue, it cut across in this direction, and it followed down; and at the Wibaux house a wall was built pushing out into this pond, in order to make more land back of his house. Now, this natural pond as it existed—it existed before the railroad was there—and still exists. The little stream coming down the north side originally cut across here where the railroad embankment now is, and followed almost directly west where that embankment was. You can see a little depression on this map at this point. Now, that is the point that is shown on the map, and to which Mr. Lyman has testified as being the banks of Beaver Creek. From the records in St. Paul, and old profile, I formed [461] the opinion that the east bank of Beaver Creek was at the location of the east end of the pile trestle, or a distance of about 125 feet away from the point that Mr. Lyman has designated as the east bank of Beaver Creek on the profile. Now, the tendency of this stream has been to cut on the outside of the curve and silt up on the in-



(Testimony of M. F. Clements.)

side. Now, this Beaver Creek with its banks, has been winding around through this pond at different locations, ever since the construction of this railroad there; probably, at one time, it was near the Wibaux house. The west break in the profile, that was shown on that profile, was very near the center of the streets coming across here, immediately back of the Wibaux house, there never was—I might say this: there might have been a bank over here at one time, but it has been gradually moving around this curve in the stream, and has been moving east, and is still moving east. This section of the highway bridge was for many years, designated as a slough, locally—at Wibaux,—so that this pond existed before, and still exists, and the breaks in the profile, in the banks of that stream, are breaks in the banks of that pond,—not of the creek.

Q. It has been testified by Mr. Lyman that in his opinion, the maximum amount of water that passed through Wibaux at the time of the flood on June 7, 1929, was 15,000-odd cubic feet per second, and he then gave it to us in round numbers, as 16,000 cubic feet per second. Mr. Clements, assuming that only 16,000 cubic feet of water per second came to the railroad bridge on June 7, 1929, what have you to say, or what is your opinion, as to whether or not the bridge could have adequately taken care of 16,000 cubic feet of water per second?

A. If you were to consider the entire area of the bridge, which I gave as 1370 feet, and divide

(Testimony of M. F. Clements.)

that into 15,000, the bridge as it stood in 1929, would have taken the water at a velocity of between 11 and 12 feet per second, which is not rapid or unusual. I [462] have seen water pass through bridges going almost 20 feet per second. I think that I have fully explained the reasons on which I base my conclusion; I just divided the area of the bridge into the total second-feet of water, and it gives the velocity of the water in feet per second.

Cross Examination:

(By Mr. Maury).

On defendant's exhibit D-24 are the letters and figures, "H.W. 1900, 7.3". That means "High Water in 1900," shown on the record as being 7.3 feet below the top of the tie. That was given as on Bridge number 184; that was the bridge that was standing there in 1929—it was, with the exception that the abutments were changed in 1903,—but the same height. If this record (D-24) was correct, in 1900 the water just touched the girder of that bridge. If the water touched the girder, and kept at the girder for any great length of time, it would not necessarily have flooded the town of Wibaux, just as it was flooded in June, 1929; the water of 1929 was about 5 feet higher than that. And if it kept on touching the girder, it would not necessarily, keep on filling up. As to whether "it wouldn't do any damage to anybody if it went down quick enough," will state that if it just touched the girder, it wouldn't be backing up at all; it would be passing through.

(Testimony of M. F. Clements.)

When I gave a space 1370 feet, I was not taking into consideration the space above the girders on the sides; I was just taking the clear opening, below the steel.

Q. Below the girder?

A. Below the steel, for the length of the bridge.

I said that formulas were made up of a great many instances. As to whether the multiplication table was made by a great many instances of addition, will state "multiplication is addition." I don't know whether you call multiplication an empirical formula or not,—it is made of a great many units; I wouldn't say that [463] it was an empirical formula.

Q. Mr. Clements, you said that Talbot's formula had a variable coefficient——

A. They all have——

Q. Listen to me: of 1 to 6; and that you knew Prof. Talbot?

A. Well——

Q. Answer that. Did you say that?

A. No.

Mr. McCARTHY: That is two questions.

Q. Did you say that it had a variable coefficient of from 1 to 6?

A. No, sir. (Mr. Maury requested reporter to read testimony on direct examination on this point).

Q. Now, you know that Talbot's formula has a variation of only from  $\frac{2}{3}$  of 1 to 1?



(Testimony of M. F. Clements.)

A. The first coefficient is  $1/3$ ; the next one is  $2/3$ . The last one is what I meant; that is, the sixth one is what I meant.

Mr. McCARTHY: If you will look at 252 in Webb's, Mr. Maury——

Q. Now, does this language occur: "For steep and rocky ground, C varies from  $2/3$  to 1," on page 252 of Webb—Railroad Construction?

A. Yes, sir. I wouldn't say that it has reference to the variable of Talbot's formula.

Q. Aren't these words above here "Talbot's formula"?

A. Yes, sir.

Q. And the words: "Multiplied by the 4th root of the drainage area to the cube"?

Mr. McCARTHY: Objected to as not proper cross-examination there, to examine him from a text book on a formula he says he rejects.

Mr. MAURY: He is thinking he can "put something over."

Mr. McCARTHY: I resent that remark, and counsel knows better; and I ask the Court to instruct the jury to disregard the remark.

The COURT: I certainly will.

Q. (Reading): "C varies from  $2/3$  to 1"——

A. In that book; yes. [464]

Q. Where else can you show us any other formula of Talbot that has any variable of 1 to 6?

A. I have a record in my office, computation made by Talbot, starting with  $1/2$ ,— $2/3$  up to 1,—

(Testimony of M. F. Clements.)

up to the last one. I got those from published data. You are quoting from a book there. I can give you something about that book too. When I spoke of Talbot's formula having a variable of 1 to 6, I was not speaking of the cross-examination here the other day; I have records in my office of computations under Talbot's formula, and they vary from  $1/3$  to six times  $1/3$ , or 2. I think I can find that in a published, printed book, but I can't produce it here; I can't produce it here Monday morning.

Q. What is the name of the book?

A. I said I could not.

Q. No; you cannot find it in any published book that you have.

A. What is this book that you have?

Q. I am referring to Railroad Construction, Theory and Practice, Handbook, by Walter Loring Webb, Civil Engineer, Member American Society of Civil Engineers; Member American Railway Engineering Association; Member American Concrete Institute; Member Engineers' Club of Philadelphia; Assistant Professor of Civil Engineering (Railroad Engineering) in the University of Pennsylvania, 1893-1901; Major, Engineer Corps, U. S. A., 1917-1920,—Ninth Edition.

Mr. McCARTHY: I suggest the book be turned over to Mr. Clements, so he can read it all.

A. I am a member of the American Society of Civil Engineers; American Railway Engineering Association; American Concrete Institute; member

(Testimony of M. F. Clements.)

of the Engineers' Club of St. Paul; Member of the Minnesota Federation of Engineers and Architects; Member of Sigma Xi; Member of the Associated Engineers' Society of the University of Iowa. I have had thirty-five years' experience,—longer experience than this man has had.

As to when I first had anything to do with the construction of this bridge, will say that there was no change made in the bridge from 1903 until after the flood of 1929. I designed the new bridge, or men under my direction, designed the bridge after that time—after the time of the flood—but this particular bridge that existed in 1929 there never has been anything to do with it; there never has been any trouble from any washout or trouble of any kind.

The exhibit D-23, introduced in my testimony, is a photostat copy of a record and the data from which this book is maintained is obtained from the local supervisors of bridges and buildings, who do the actual "house-keeping" or repair work on bridges or buildings. Each month, they send in a report of work done, and there is one maintains this record and it goes to him and he copies any changes that are made, into this book. This was not always just one page—this is a page out of a book, large book—we have for the whole railroad twenty of these books; they are very large and cumbersome. Whether this page from which this photostat copy was made was in existence in 1891—the



(Testimony of M. F. Clements.)

other sheet you will find who actually made the sheet, 3/13-91,—that was the date the books were started.

Q. I am talking about this one here, D-23.

A. They appear opposite each other; here is the binding of the book in the middle; here is the pages you turn over.

Q. And are these, the original records, of the same age—the paper and the page and everything—D-23 and D-24?

A. This is the same, that is, the original from which this was taken are both of the same date “91”. I had the original pages, now back in St. Paul, photographed for these exhibits.

Q. Were the various bridges put on about the time that they were erected—put on the original now?

A. On the original; when the reports came in, these were put on. You find in the left-hand corner here the bridge with the Howe truss shown there (pointing [466] out to the jury). We start at the extreme top of the page; the first one is 311, which is now 184; here is the bridge that has the Howe truss. At the extreme bottom, left-hand, that is simply a vertical line representing the first bridge—the first bridge that I set up, was continuous pile trestle, but a portion of the bridge had been replaced by this Pony Howe Truss—on the model. Then, following that, was the bridge,—the permanent bridge, the various lines which show the

(Testimony of M. F. Clements.)

various elevations. It is rather difficult for a layman to follow all those lines—all those marks.

Q. We are going to ask you to translate them all by Monday morning,—all of the bridges. What is that?

A. That is the bridge that existed over Wibaux Street—that existed after the flood. The next one is the present one over Beaver Creek; that bridge was built after the flood in 1929. That, in the extreme right-hand corner, is the underpass for school children at C Street. That, at the top of the page, is the bridge that existed over Wibaux Street at the time of the flood. The east section of this here, the east span,—that is the same span that was in the other bridge, in the center. As you understand it, that same steel there in the east span is this here (pointing to the bridge model)—what this represents in actual life. On these two exhibits, D-23 and D-24, there is a vast deal of abbreviation and lettering and figures that only an expert can understand,—well, a man could understand it if it were explained to him at the time, if he wanted to look at it, probably, but to the ordinary man, it needs a great deal of explanation.

Q. By the way, looking at D-24, can you tell us what the words and figures “H.W. 4/1-93—7.7” mean?

A. It has nothing to do with the Beaver Creek bridge. You find in the left-hand corner here.

Q. Oh, yes, I see.

(Testimony of M. F. Clements.)

A. Now, there is one in here; that is that school undercrossing; it is out of place, because the page was filled up. There is bridge 184,—it was originally called 311; and [467] this is the Wibaux Street—which was 184.1. We find some more letters “H.W. 4/1-93—7.3,” and “Beaver Creek” right opposite. That means the high-water of 1893, and that was the date of the high-water—fourth month, first day, of 1893; the high-water was 7.3 feet below the top of the ties on April 1, 1893. As to who would send in the water measurements,—well, there are standing instructions to assistant engineers—for instance, Mr. Oien is assistant engineer at Glendive. He covers certain territory, and he has instructions that after high-waters, he should go over the line and note where the high-waters were, and send in a report where the records can be kept. At Wibaux, for instance, in the last twenty years, the assistant engineer who was located at the headquarters of that particular territory, would be the man to actually take the records of high-water and send it into the company. As to who would point out the high-water mark to him when he got there on his inspection trip,—each section foreman in his territory are called upon to note where high-waters were, and the assistant engineer goes over the ground as soon as he can, to note these high-waters, and records can be found in the grass and debris of all kinds, to show where high-water was. I can't say as to whether the man of the Northern Pacific Railway Company who was supposed to report



(Testimony of M. F. Clements.)

it in the last twenty years, to the Northern Pacific Railway Company, was a section foreman named John Presthus, at Wibaux.

Q. Whoever was the section foreman was the man?

A. The assistant engineer makes many observations of his own, but each employee that is on duty along that particular section is required to note the high-water, to show this information to the railroad. In regard to how he measures that high-water,—well, as far as those high-waters are concerned, they are presumed to represent—I would say, the center of the bridge; he doesn't make more than one notation. [468]

Q. Does he go out on the bridge and drop a plummet through?

A. It measured down either with a level rod or tape.

Q. And the high-water mark, if I understand it, means that right at the center of the track, he drops something and measures the distance from high-water to the top——

A. To the top of the tie. All records of that kind are kept,—you call it base of rail or top of tie—the two are the same.

Q. Yes; but I am talking about where the measurements are made on the bridge. Now, Mr. Clements, if there is a very strong backing of water on the bridge—we will say there is a difference in elevation between the upstream side of the water

(Testimony of M. F. Clements.)

and the low stream side of the water, of ten feet—we will suppose that—am I not right in saying that a measurement right in the center of the bridge would be five feet in error, and too small—too short?

A. That would be a very unusual condition; if such a condition existed, the assistant engineer would take all elevations.

Q. I know; but try to answer my question: If there was a difference in elevation between the water above the bridge and the water flowing away from the bridge, of ten feet, then right in the center of the bridge a measurement would be five feet in error, would it not?

A. It would be correct for the center of the bridge.

Q. But, as a high-water mark on that bridge, it would be five feet off under those conditions?

A. It would be correct for the center of the bridge, and it would all depend on the conditions you were going to use this elevation for; if there were ten feet difference in the elevation, it would be a change in the velocity; otherwise, there wouldn't be such a drop,—the velocity must be used with it. So, if he found an elevation for the center of the bridge, it was correct for that position. The drop would be comparatively uniform as it went down from an elevation above until it got out to the ten feet below, and about half way down the slope of the water, [469] it is true that it would be half the distance of fall.

(Testimony of M. F. Clements.)

Q. And are there in existence any records of this bridge for high-water, where the measurement was taken from the upstream side of the bridge?

A. Not so designated, as I know of, as to where these measurements were taken; but the usual custom was to take it in the center,—that is the way the St. Paul office expected and required that it be done. I have not “prepared any of these little yellow wands and tacks” to show the water-mark of 1900 on that bridge.

I spoke of rainfalls in my direct testimony—that I designed a bridge to take care of rainfalls; this bridge at Wibaux is in the badlands. The badlands extend from Glendive on the west, to Medora or further, on the east. That is a region of acute storms, such as cloudbursts, in that territory.

Q. By the way, storms like that, could be expected by an engineer just from the natural topography of the earth?

Mr. McCARTHY: Storms like what?

Q. Acute storms; cloudbursts?

Mr. McCARTHY: You are speaking generally now?

Mr. MAURY: I am speaking of what Mr. Clements said.

A. Yes; cloudbursts occur in that territory; and all through that territory. I wouldn't attempt to answer that question as to why they occur there.

Q. Hasn't it been known by highschool students of physical geography that their causes are due to solstice,—mid-summer, the winds coming from the



(Testimony of M. F. Clements.)

west and coming over the snow-capped peaks of the Rocky Mountains and, on this area called the badlands, they meet the very hot winds from the central plains and make an immense precipitation of water?

Mr. McCARTHY: This would be very interesting, but we must object as improper cross-examination; we didn't go into any geography—— [470]

The COURT: I don't think you need to go into that. I will sustain the objection. Cross-examine him on the conditions there in that valley.

Mr. MAURY: We except.

Q. Have you seen in that valley scenes like that, close to Wibaux?

A. That is typical badland country.

Q. And typical of the scenery close to Wibaux?

Mr. HALL: We object to that——

Mr. MAURY: We offer this in evidence.

Mr. HALL: We object to this picture on the ground there is nothing to show it is at all similar to the condition at Wibaux; it is a picture of a badland territory.

The COURT: Is it in the Beaver Creek country?

Mr. McCARTHY: May I ask a question? Q. Mr. Clements, are there any badlands proper in the Beaver Creek valley? I mean from Wibaux south; I don't mean from Wibaux north; but I mean Wibaux south, towards Ollie?

A. You are asking a question I can't answer—as to what badland country is. As to what I mean

(Testimony of M. F. Clements.)

by "badlands": a badland country, as I understand it, speaking from a geographical standpoint, is a country that is eroded, and it has hills and valleys and the valleys have been caused by erosion, and many peculiar shapes have been formed on account of the various types of material that is in the ground, some of which will scour readily and some will not. I have driven up Beaver Valley, up along Beaver Creek; I mean by "up", going south. I never saw anything there that is in the pictures such as Mr. Maury is showing me.

Mr. McCARTHY: Then, we object to the pictures on the ground that they do not properly portray the conditions in the valley to the south of Wibaux. [471]

Mr. MAURY: This is subject to further examination, I hope. Q. Now, Mr. Clements, you have seen typical scenery to this right near Glendive and Medora, and right close to Wibaux——

Mr. McCARTHY: We object——

The COURT: I will sustain the objection.

I said that I took into consideration climatic conditions in building that bridge—that is one of the general conditions that are considered. The climatic conditions there at Wibaux that I took into consideration, are the type of storm particularly, or what causes the water to flow in Beaver Creek, that is, the consideration I take, it was not as great rainfall as some others, but it has many acute storms, practically all of which are comparatively

(Testimony of M. F. Clements.)

small in area, but there would be a considerable wall of water fall in a comparatively short time, making a quick runoff.

Q. Were you familiar with a storm which occurred there in 1921?

A. I know something about it, yes, sir.

Q. How far did that storm extend along the line of the Northern Pacific Railway Company?

Mr. McCARTHY: Objected to as immaterial and not proper cross-examination.

The COURT: I think so. What effect did it have on the Beaver Creek valley—the watershed?

Mr. MAURY: We want to know what the witness means by “small extent”.

The COURT: You can cover the State of Montana, if you keep on. Confine yourself to the Beaver Creek valley.

Q. What was the extent of that storm in 1921 in miles, if you know?

Mr. McCARTHY: Same objection.

The COURT: Sustain the objection, unless you confine it to the Beaver Creek valley. [472]

Mr. MAURY: Your Honor, a storm that extends out of the Beaver Creek valley——

The COURT: The objection is sustained.

Offer No. 2 (In writing):

“Plaintiff offers to prove by witness that the storm of 1921 extended from Wibaux to Medora 35 miles.

Colton - Maury  
For plaintiff.”



(Testimony of M. F. Clements.)

Mr. McCARTHY: Same objection as heretofore made.

The COURT: Same ruling.

Mr. MAURY: Exception.

Q. Mr. Clements, you spoke of the type of engine that the bridge was designed to carry. I show you a picture. Was that the type of engine that went over the bridge about the time it was built?

Mr. McCARTHY: That is the early bridge?

Q. The bridge that was standing there in 1896?

A. That was when the change was made. Which one do you refer to?

Q. The bridge of 1896?

A. The two of them in there?

Q. In 1896, was this the type of engine and about the size of engine that traveled over the Northern Pacific Railway at Wibaux?

A. I believe that this engine was purchased around 1900; it might have been there in 1896, but I wouldn't be able to state the——

Q. This is the type of engine of about that time, isn't it?

A. That is what they call a ten-wheel engine.

Q. And they were in use in about 1896?

A. Oh, well, they were still using engines like that.

Mr. MAURY: We offer it in evidence; it is marked X-11.

The COURT: What is the purpose of introducing it? What light will it throw on the case?

(Testimony of M. F. Clements.)

Mr. MAURY: As the weight of engines increased, the bridge should be increased.

The COURT: Very well; it may be admitted in evidence. [473]

I am not positive about the number of changes made in the bridge about 1898. The spans were strengthened, I hadn't mentioned this particular thing, but they were increased in carrying capacity later than '94. But that is about the time we adopted a new standard in the design. In using the design, we have what we call a "typical loading"—not necessarily a typical locomotive—one that could be used years ahead of its time. This one,—that was reinforced, I think, about 1904. I think the bridge record will give the date.

Q. Yes; when was that bridge changed?

A. A center girder was put in. You see, it has two outside girders supporting the ties. A center girder was put in carrying the—I don't know whether it shows it or—1904, the bridge was reinforced. As to how much it was reinforced in 1904,—it was increased probably 50%; there was a third girder put in and the carrying capacity increased about 50%.

Q. The bridge designed in 1896, was not standing there in 1904, was it?

A. The original bridge was standing. As to what was added to it: put in some steel; there was no change in the piers or anything of that kind.

(Testimony of M. F. Clements.)

The bottom clearance line of the middle girder placed there was the same as the outside ones.

Q. Hadn't there been a material, substantial change from the plans of Darling as early as 1902, in that bridge?

A. In 1898, it was raised; and the original plans were not changed then,—it was simply added to. The abutments were built later. There was no change in the piers, but they were raised five feet. When they were raised five feet, we did not have to fill in on the stream side in order to hold them up for the heavier engines. Any change in the raising there had nothing to do with the strength; that added nothing to the strength as far as the carrying capacity in carrying the trains. When the center girders were put in in 1904, that meant the steel portions were strengthened 50%. That [474] is due to the purchase of heavier engines after the time that Mr. Darling built the bridge; and we put the concrete right on top of the pier,—illustrated in the model. When the water cleaned that out in 1929, additional concrete work was not revealed on top of the east abutment; I would say that was not additional concrete work (witness examining exhibit handed to him by counsel). The abutments were built at the elevation of the bridge as it existed in 1929; those abutments were built in 1903, and never any change made in them. Defendant's exhibit Y-30 looks very much like the east abutment after the flood cleaned it in June,



(Testimony of M. F. Clements.)

1929; I would say that there is no additional concrete work put upon that. As to whether I would say that that bridge stood there just according to Darling's plans, until June 7, 1929, will state that there was no change in the substructure,—the piers, embankment, and all—from 1903 until 1929. As to what change was made between 1896 and 1903, the grade of the track was raised in 1898, five feet, and in 1903, the abutments were built; there was no change in the substructure or the embankment as such. In 1904, as I read the record, the girders was strengthened after that, carried on the substructure,—were increased 50% in 1904.

Q. A bridge is designed for down-thrust, but very small side-thrust, is it not?

A. Designed to carry the vertical loads and the result of tractive effort along the track, or the setting of brakes. This was at a point where trains would be coming down steep banks from both sides, and brakes would be set; that setting of the brakes does not add very much to the weight, or the down-thrust. Many times, it is—the usual increase in the vertical loads, to take care of longitudinal thrust is 20%, but from actual tests, the longitudinal thrust does not exceed more than 8%; the brakes on a car or engine will not exert any greater influence than that. [475]

Q. Now, the type of engine rose in weight, to what extent in the next few years after that bridge was built? How much did you increase the weight of engines going over there?

(Testimony of M. F. Clements.)

A. When the center girders were placed, the bridge was made equal to a specification load which we call E-52.

(Question repeated):

Mr. McCARTHY: It would be very interesting to hear all of this, but the witness says that so far as the water-carrying capacity of the bridge was concerned, there wasn't any difference; that whatever strengthening there was done as far as the girder was concerned, it was on the superstructure. It wouldn't have any possible effect whether we ran a light engine or a heavy engine as far as the water-carrying capacity is concerned. Objected to as immaterial, irrelevant and incompetent, and improper cross-examination.

The COURT: He has told you it was because of the additional weight of locomotives, to provide for that.

Mr. MAURY: We want to show how much the weight was and how they provided the original plans by filling up the abutments.

Mr. McCARTHY: The witness says there was no change. What is the difference whether there was a heavy structure on top, or light, or whatnot?

The COURT: If there was a filling up of abutments there, why don't you go directly to that and find out about it? If the opening was decreased, or if there were changes made, I can't see either what difference the weight of a locomotive has to do with it. There may be various changes I sup-

(Testimony of M. F. Clements.)

pose. What about the carrying-capacity so far as the opening is concerned?

Mr. MAURY: We say it in nowise corresponds on the model [476] as to what it was when the bridge was first built—as to these two side-aper-  
tures,—it doesn't correspond at all.

Mr. McCARTHY: I think it is apparent that counsel is merely trying to delay the examination of Mr. Clements until Monday morning, so he can confer with his engineers over Sunday.

Mr. MAURY: Not at all. I know just exactly what they did in the way of change in the Darling plans, and I want to establish that by the testimony of this witness just as well as by the testimony of others.

The COURT: Proceed. You can get there while you are talking.

Mr. MAURY: Yes; that is what I wanted.

The COURT: Still, I don't see the purpose of it, and I will not let you go very far unless you develop it very soon.

Q. Did there have to be a strengthening of that abutment when the engines were increased in weight?

A. No, sir.

Q. Did there have to be a straightening of that abutment when the track was raised?

A. No, sir.

After 1896, the track was raised first in 1898; it was raised at the time the Beaver Hill was cut



(Testimony of M. F. Clements.)

down and wasted the dirt in the sag; it was raised five feet. It was not raised again, before 1929. When the steel bridge was built, the track was raised three and a half feet, so the bottom of the girder would not be any lower down or project into the area any more than the Howe truss. And the abutments were not built until 1903, and there was no change in the abutments whatever until the flood of 1929.

Q. No change?

A. None at all.

Q. Then, there was no change in the strength, according to your testimony, of the abutment?

A. None whatever. [477]

Q. And no change whatever?

A. Not after 1903,—none at all. Between 1896 and 1903, it stood as the Darling bridge; it didn't have concrete abutment,—it had timber abutment. But the piers—except in 1898, there was five feet additional height placed on the piers. When I say the bridge was safe all those years, I mean both—safe for the citizens of Wibaux living upstream from it, and safe as a structure that would stand. It was safe as a structure that would stand even after the flood of June 7, 1929,—it did stand.

Q. Will you place back the second bridge that you showed?

A. On the lower level?

Q. Yes; on the lower level. (Witness placing portions of model).

(Testimony of M. F. Clements.)

A. That is in 1898 that you want?

Mr. HALL: The second was in 1896.

Q. Yes; I want the second bridge you showed us. The one I want is the second one of the permanent—How high is that one above the point “B”?

(Witness measuring).

A.  $21\frac{1}{2}$  feet.

Q. From the low water mark?

A. Bed of stream.

Q. What is the highest water mark that you have on that bridge as it stood there?

Mr. McCARTHY: The last question, Mr. Maury, was the difference between the bed of the stream there and the top of the tie?

Mr. MAURY: And the top of the tie.

Mr. McCARTHY: And that was how much?

Mr. MAURY:  $21\frac{1}{2}$  feet.

A. This is down,—10.8 feet.

Q. From the top of tie to what?

A. To the high-water mark.

Q. Then, that shows 10.8 feet. Was the viaduct there at that time?

A. That was built in 1912.

Q. There was no opening there at that time? Why are these both on the same side—those yellow strips? When there is any binding [478] of water, the water is never the same on both sides—

Mr. HALL: Objected to as repetition.

(Testimony of M. F. Clements.)

Q. How much of the space between the abutments and the piers was covered by that water mark? Have you calculated it?

A. No, sir.

Q. How much of the entire space from the pier to the abutment was taken up by that structure there?

A. You mean how far it is from the clear opening?

Q. Yes.

A. It is about 17 feet clear opening between the pier and the abutment.

Q. How do you compare Mr. Bernard Blum's reputation as an engineer—bridge engineer—with Mr. Darling?

Mr. McCARTHY: If the Court please, I think Mr. Clements is working with Mr. Blum. I think it might be embarrassing; Mr. Blum is here. You might as well ask me what I think of our General Counsel.

The COURT: I think I will sustain the objection. I don't see any purpose there—any reason for it.

Mr. MAURY: The purpose is, your Honor,—Mr. Blum says that is an insufficient bridge—

Mr. McCARTHY: I must object to counsel making freely, statements of that kind.

The COURT: Sustain the objection. Proceed.

Q. Mr. Clements, you have heard Mr. Blum testify about the size of the bridge that should be there?



(Testimony of M. F. Clements.)

Mr. McCARTHY: Objected to as improper cross-examination—what he heard Mr. Blum testify to.

The COURT: He can call his attention to something Mr. Blum said—some concrete fact there—and ask him what he thinks about it. If he has testified about it, then you have your opportunity to compare notes when the matter is presented to the jury.

Q. You have heard Mr. Blum asked: “How long was that bridge?” and [479] he answered: “This plat shows that that bridge was 114 feet I think—114 feet long,” and he was asked: “Was that the measure of adequacy? Is that what should have been there—an opening of 114 feet?” and he answered: “From the evidence up to June, 1929, that was according to good engineering practice, was an adequate opening.” You heard him say that?

A. Yes, sir.

Q. Was there an opening of 114 there?

A. That is the length of the bridge at the top.

Q. But was there ever, from 1896 on, an opening of 114 feet in that bridge?

A. That is the length of the bridge at the top of the tie. You cannot measure openings in one dimension; they must be measured in two directions—you measure openings in two directions; you must have the height as well as the length. 114 doesn't mean the opening at all.

Q. Did you hear Mr. Samuel Murray (he is a very fine bridge engineer),—did you hear him testify?

(Testimony of M. F. Clements.)

A. Where was that?

Q. At Baker?

Mr. McCARTHY: Mr. Murray is here—if he ever gets through so he can go back. We will have him on the stand. If this examination is prolonged indefinitely, I fear his associates at Portland, Oregon, will insist on his returning before we can get through with him. Why ask Mr. Clements to explain Mr. Murray's statements? Objected to as improper cross-examination.

The COURT: What testimony are you presenting to him now?

Mr. MAURY: Samuel Murray's; he testified at Baker, in September of——

The COURT: Call those facts to his attention——

Mr. McCARTHY: Mr. Clements wasn't there at that time, Mr. Maury.

Mr. MAURY: Oh, Mr. Clements was not there?

Mr. McCARTHY: What year is that? [480]

Mr. MAURY: I haven't it marked here; I think it is 1933—last fall.

Q. Now, would you change your opinion if Mr. Murray said—Mr. Samuel Murray, of the "Oregon" Railway: "There was a 70-foot center span and two 20-foot small girder approach spans. Question: And your conclusion was that a reasonable and adequate bridge there at all times before June 7, 1929, should have had openings corresponding with what you have named? Answer: Yes, there might

(Testimony of M. F. Clements.)

have been some variation—slight variation, but it was in that vicinity.” If Mr. Murray’s opinion was that, would you change your opinion as to whether or not that was a sufficient bridge or not, Mr. Clements?

A. No, sir. I don’t get the force of your question though.

Q. But there was never any such bridge as that described, was there,—between 1896 and June 7, 1929, of a 70-foot center span and two 20-foot small girder approach spans? They never were there, were they, Mr. Clements?

A. These you mention, 70 and 20, are not exactly true in this sense. The overall-length of these structures is more than 70 foot and more than 20. It is 71 feet, eight inches; I believe the end-spans are 20 feet 11½ inches or either 21 feet 11½ inches.

Q. That is at the top?

A. That is the overall length of the steel portion of the bridge.

Q. But there never was such an opening at the bottom, was there?

Mr. McCARTHY: Objected to as repetition. He has already suggested that you measure openings in square feet or square yards.

The COURT: Sustain the objection.

Mr. MAURY: Will you translate everything that is on those two exhibits by Monday morning, so that the ordinary person who is not conversant with them will be able to understand what they are? [481]



(Testimony of M. F. Clements.)

Mr. McCARTHY: Do it now,—if you want him to.

The COURT: Everything pertaining to this case.

A. This exhibit is a reproduction of the bridge record, reproduced by photostatic process—photostatic copies. In the left-hand column is given numbers, which are bridge numbers. This point is 3, which is 184.——

The COURT: I see Mr. Maury is tired, and I am not going to listen to this this evening. (Jury admonished and excused until Monday morning, April 2, 1934).

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(By Mr. Maury):

Q. Mr. Clements, at the trial of the Heckaman case in Baker, in September and October, 1931, there were certain plans of the bridge that was built there in 1896 introduced in evidence,—called exhibits,—do you recall that?

A. Certain plans?

Q. Yes; certain blue prints.

A. You mean plans of a bridge?

Q. Blue prints of the bridge of 1896 and 1898, introduced while you were on the stand, and produced by you?

A. I believe that is true; yes, sir.

Q. Do you know where those blue prints are now?

Mr. McCARTHY: Objected to as immaterial, if the Court please.

(Testimony of M. F. Clements.)

A. I do not know.

The COURT: I think that is proper. Let him answer, if they are of any consequence in this suit.

Q. Those blue prints were withdrawn by the railway from the custody of the clerk at Baker?

A. I do not know.

Q. And they were withdrawn last September—that was September, 1933,—were they not?

A. I was not a witness in any case in September, 1933; I was not present at the trial.

Q. You were not? Those blue prints of that bridge, that were admitted in September, 1931, were then marked exhibits “A”, “B”, [482] “C” and “D”, were they not? I refer to this testimony of your’s. (Showing printed transcript on appeal to the witness). Here is “B”—Defendant’s B is a diagram of the bridge that was constructed in 1884—that is not the one. Were there further pages? Defendant’s “C”, that was a diagram of the so-called permanent bridge built in 1896, to replace the former Howe truss bridge?

A. That is correct. Defendant’s exhibit “C” was made under my directions, and introduced while I was on the stand. And then, there was a plan of the bridge as it stood there from 1898 to 1903; that was defendant’s exhibit “D”, and it was made under my direction. That was the bridge of which I purported to set up a visible concrete model here in court, day before yesterday, I don’t know where that plan, exhibit “D”, is.

(Testimony of M. F. Clements.)

I spoke Saturday, of the railroad having interfered with this tributary stream here when it was first built, in 1883, and moved it; I know that from records that are in the St. Paul office. No such records as that are here in court; this exhibit—the relief map is—the only one that shows it.

Q. This depression going down to the north of the railroad track is what you say shows it?

A. There is a small depression right here shows where the stream originally went through.

Q. By “right here”,—you are drawing a line from an inch north of the fill up to the top of the ties and westward on the bridge; and you say there is something there that shows it.

A. There is a bank here at the lower elevation—not at the top of tie; I was just giving you the top of tie. I say that it appears on the model.

Q. Mr. Clements, on exhibit D-24, no matter how many high-water marks after 1900, that John Presthus, the section foreman, might have sent in to St. Paul, they would not have been marked down on this permanent record unless they were higher than 7.3 feet below the tie—the mark of the 1900——

A. In the first place, the [483] section foreman didn't send in any information. As to who he gave it to: I stated here, the section foreman was required to note where the high-water occurred, and the elevation was taken by the engineer.



(Testimony of M. F. Clements.)

Q. Yes; no matter how many high-water marks would go into the St. Paul office of the railway from the year 1900 to 1929, they would not be marked down on this permanent record, unless they were higher than 7.3 feet beneath the top of the ties?

A. That is not necessarily, although it is the general rule.

Redirect Examination:

(By Mr. McCarthy).

Defendant's exhibit D-25 is a drawing of the elevation of Beaver Creek bridge, as it existed at the time of the flood in 1929. "Elevation of the bridge as raised in 1898 with concrete abutments placed in 1903. The same was reconstructed in 1896, except it was raised 5.3 feet in 1898. Concrete abutments added in 1903 to replace former timber piers." (Reading from defendant's exhibit D-25, #566).

I call that (indicating on exhibit) a side elevation. The side elevation shown on defendant's D-25 portrays the same thing as the model does, except in a different form.

You note on there three colors—brown, blue and yellow. Brown indicates the water that was below the high-water of 1893, and between the brown and the next high-water elevation, which was in 1921, is shown as—is that blue or green?

Q. You say whether it is blue or green.

(Testimony of M. F. Clements.)

A. Well, I give that blue; and the upper section, or yellow, is the water that is between the high-water of 1921 and the high-water of 1929. This exhibit was made up from records,—the same records that were used to make the bridge model.

Mr. McCARTHY: Defendant's exhibit D-25 is offered in evidence. [484]

Mr. MAURY: All right, no objection.

The COURT: It may be received.

Q. Mr. Clements, you were asked something here about the 1900 high-water mark, and counsel discussed it at length Saturday afternoon. What is the records so far as the 1900-mark is concerned? Explain that a little more fully.

Mr. MAURY: Object to the "facts".

Q. All right, take out the "facts". Explain your interpretation of the 1900 high-water mark, as shown on either defendant's exhibit D-23 and D-24, Mr. Clements, with particular reference to defendant's D-24, Mr. Clements,—will you comment on the record—the exhibit referred to, so far as the 1900 high-water mark is concerned. Explain it in your own way, and your interpretation of it, to the jury.

A. There are three high-water marks on the page you have there, and the first one is 7.3 feet below the top of the tie, which was the record of 1893. In 1898, the permanent bridge was raised a little over five feet—it has been mentioned as five feet—it was actually 5.3 feet; and the record of the 1897 high-water, which was the next one following

(Testimony of M. F. Clements.)

the 1893, shows it to be 2.8 feet, or 10.8 feet, which is—the bridge had been raised in 1896; the elevation of the track had been raised  $3\frac{1}{2}$  feet to provide for the steel of the same clearance as the Howe truss—that is, the bottom of the steel had the same clearance, vertically, that added to the 7.3 feet, makes 10.8 feet from the new elevation of the track. The high-water of 1897 and 1893 were of the same elevation as near as—maybe one inch difference, but for all practical purposes, it was the same thing. Then, in 1898, the bridge was raised a little over five feet, that is, when they cut down the grade of Beaver Hill. The record sheet shows it to be—the 1900 high water, 7.3 feet. Now, the amount is the same as in 1893, although the grade of the track is different. But in running [485] down this record, we have not been able to find any supporting data; and all other high-water marks do have supporting data of high-water marks, in the way of letters and reports from assistant engineers, and I assume that that record is in error. The draftsman who made the record actually copied the 7.3 feet, the previous figure. There is no information we have that there was any high-water in 1900, either in the way of letters or reports. We found no one who has any recollection of the high-water, so we assume that the 1900 is in error.

On Saturday, in connection with my cross-examination by counsel, Mr. Maury read to me parts of “Webb on Railroad Construction”; I have looked at the work since. There is something that



(Testimony of M. F. Clements.)

I want to explain in connection with my testimony on Saturday: I stated that the ratio of a coefficient to be applied in the Talbot formula for size of openings of culverts had a variation of 6, and Mr. Maury, in pointing this out to me,—I read only the first part which said that the variation of the coefficient is  $2/3$  to 1. Down a little further in the text, it says: “Districts not affected by accumulated snow and where the length of the valley is several times the width, it may be  $1/6$ th.” That is what I referred to. I didn’t read this over Saturday afternoon; he had his finger over the bottom part; I didn’t see it; had his finger over the bottom part—“it might be  $1/6$ th, or even less.” As a matter of fact, the ratio might be as much as 1 to 8, as applied by some people.

#### Recross Examination:

(By Mr. Maury).

Q. Has this D-24 any record of the high-water mark of 1921?

A. That is on the other sheet; it wasn’t recorded on that page. As a rule, this record—this sheet and also the diagram—these two pages, putting them together, really is the whole thing. On here, it says, “High water of 1921,” which is 11 feet below the [486] top of tie; that is on D-23.

Q. But let me understand you clearly. D-23 and D-24, as they exist in the original—not on these photostatic copies—were all made on a paper printed 3/13-91, which meant the 13th day of March in the year 1891, doesn’t it?

(Testimony of M. F. Clements.)

A. That is the record of the printer who made the original set; and as this data came in, men in the office would put it on the pages, of which this was a photostatic copy. As to who some of those men were that did that, I can recall the names,—I believe the first man who maintained the bridge records was a man named Stang,—I cannot give the initials. He was followed by his son. Mr. Stang was working on that record when I commenced to work in the same office; I commenced to work in the same office in 1907. That is the first intimate knowledge I had of how these records were kept, and had been kept. And likewise, as the bridges were changed, the new bridges were put,—or diagrams of the new bridges—were put on that page “D-23”. [487]

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SAM CARLSON,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination

(By Mr. McCarthy).

My name is Sam Carlson. I live at Miles City; am a section foreman employed by the Northern Pacific. I have worked for that company since 1892. From 1892 to 1897 I was at Wibaux, as section laborer and section foreman; part of the time I was a laborer and part of the time I was a section foreman. In 1897 I moved to Shirley to work;

(Testimony of Sam Carlson.)

that is about 20 miles east of Miles City. I worked there two years, then I came back to Wibaux in 1900 in the fall; I left Shirley in 1900 in the spring and went to St. Paul, and in 1900, in the fall, I came back from my vacation and started in at Wibaux. There is a way of fixing the year 1900 particularly in my mind,—I was married that year; I didn't forget that. I took a wedding trip in 1900; we went to St. Paul, and I went back to work in the fall of 1900 at Wibaux.

During the years that I worked in Wibaux, we never had any trouble there with water getting backed up or the railroad bridge clogged with water or anything of that sort.

Q. When you went back to work in 1900—in the fall of 1900—did you find any high-water marks of any 1900-high water,—anything to indicate there had been any trouble there that year?

A. No, sir.

Mr. MAURY: We object to that. It doesn't show that he looked for it.

The COURT: Yes; sustain the objection.

After 1900, I stayed at Wibaux then until the spring of 1921. During any of that period we didn't have any trouble there or encounter any trouble with high water at the railroad bridge.

I held an official position in Wibaux; was on the city council from 1915 to 1921 I think.

Q. Now, during the years you were on the city council, did you [488] ever hear any complaint about the railroad bridge being inadequate?

A. Not that I can remember.



(Testimony of Sam Carlson.)

Mr. MAURY: Just a moment. If your Honor please, we object to that as being too remote; probative of nothing.

The COURT: Too general; sustain it.

I said I went back to Wibaux in 1900, in the fall; I remember who was section foreman just ahead of me there in 1900—a fellow by the name of Ole Olson. I don't think he is alive now. I remembcer a man by the name of Mr. Rehbein who worked on the section there in 1900.

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### AUGUST REHBEIN,

being first duly sworn as a witness in behalf of the defendant, testified:

#### Direct Examination

(By Mr. McCarthy).

My name is August Rehbein. I live at Miles City; am a farmer. I have been on the farm near Miles City since 1904. I am the man that Mr. Carlson referred to a few minutes ago as having worked on the section for the Northern Pacific at Wibaux some years ago. I was working just as a common laborer; was working there in the year 1900. I had occasion to go over the railroad bridge at Wibaux every morning and every evening. I worked there the entire year of 1900—until fall, in Wibaux. With reference to there being or not being any high-water trouble at Wibaux under the

(Testimony of August Rehbein.)

railroad bridge during that year, will say that I never seen any. The time I worked for the company was from 1899 to 1904 in June; I haven't worked for them since 1904.

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ANSELIN ZINDA,

being first duly sworn as a witness in behalf of the defendant, testified:

'                                      Direct Examination

(By Mr. McCarthy). [489]

I live on a farm out of Wibaux. I have worked for the railway company; I don't work for them now. In June, 1929, I was living in Wibaux—in the town at that time. I think I can point out here on the relief map where my house was (witness pointing).

Mr. McCARTHY: Witness indicating a house about half-way between the city water tank and the Mattie Miller house, which house is immediately to the west of the Senator Kinney house and directly north of the two white lines on the banw of the creek.

It was at home on the morning of June 7, 1929; I got up about 7:00 that morning. I saw water in the vicinity of my home when I got up; saw water around there. Between the houses there, there was about six inches of water. The water was coming from the south. The water was moving north. After I woke up, I got out and was going to make my get-away in the car; I got in the car and started

(Testimony of Anselin Zinda.)

it and was going to get to high land. I would say it was about five minutes after I got up that I got out to the car; I didn't stop and have breakfast first that morning. Well, I got the car started and I drove up in front of the house out in the road there, and a rush of water come and flooded the engine. That water came from the south. As to the depth of that water, that was about a three-foot wave. I couldn't give you any idea as to the width of that wave. This wave got to my engine and the engine died. I didn't get it started again; I didn't even try; I got out and started to wade out. After the flood was over, I found my automobile. It wasn't just where I left it; it was moved north I would judge about 50 feet.

Q. When you left the automobile that morning, how was the car standing with reference to the creek? Was it parallel to the creek or right-angles to the creek, diagonal to the creek, or—

A. The car was standing east and west. When I found it, it was headed south and north. When I abandoned the car that morning, [490] I had it in low; when the wave hit there, I didn't stop to take it out of gear,—I left it as it was and got out of there. I started for right straight for the church there, northeast. I was going to go to the railroad "dump", if I could make it—the railroad "dump"—the grade; that is, up high there where the main line is. I went to over Pickering's pool hall there, in the rooms.

I observed conditions there that day in Wibaux;



(Testimony of Anselin Zinda.)

I was looking out of windows on the north side. On my way down to the Pickering pool hall, with reference to there being or not being any water in the town of Wibaux, will say that it got shallower there; it was shallower when I got to the pool hall there—shallower than where I left. The water I encountered there was moving north.

Q. You got up to the Pickering pool hall and when looking out the north windows there, what did you observe with reference to water?

A. She come up pretty high there. Then it went down a little. I saw the railroad embankment, or a part of it, washed out that day.

Q. How was this high water with reference to the embankment and the going-down of the water? Did that take place before or after the embankment went out?

A. What do you mean—the first raise?

Q. Was there more than one raise there that day?

A. There was the first and second.

Q. All right, let us take the first raise then. Had the embankment gone out when the first raise took place?

A. Yes, sir. Then, after the first raise, it went down about a foot. Then the second raise, with reference to the first raise, was maybe 15 minutes or so afterwards. At that time, part of the railroad embankment was out. As to whether part of it was out when the first raise came, will say that when it first come, it wasn't out; when the first

(Testimony of Anselin Zinda.)

raise came, the embankment wasn't out. In connection with the first raise with reference to time, the embankment went out just before the water went down. The second raise came about 15 minutes after the first raise. (Compared with the first raise, the [491] second raise was about a foot higher.)

### Cross Examination

(By Mr. Colton).

I was trying to make the grade there—the railroad—that is why I didn't go up to the church when my car stopped. My house was right there (where you are pointing). I didn't go up on the hill there at that time because there was a valley between there; that valley was running north. That is the old swale running north and south there from the water tower towards the railroad embankment—kind of an old swale. My car did not get stopped in that old swale. I stopped my car because it was in front of the house. As to whether I drove it at all,—I did a little ways. I didn't drive it a little ways towards that swale or valley; I drove it east—this way. Going down to Pickering's pool hall I went right by Kinney's house there. That is Kinney's house that you are pointing to; and then I went on over to the Methodist church here, and then I went down Main Street. I went by Nick Wagner's place of business. At Nick Wagner's place at that time, there was about a foot of water; there was a shallow sheet down there at that time. Then I went down here and got on top of the Pickering pool

(Testimony of Anselin Zinda.)

hall right here—inside there. The viaduct at that time, was the same as ever. There was quite a bit of water going through the viaduct at that time. By “quite a bit” I mean there was a lot of water going through there. That water was coming from the south. I noticed water coming by the Fullerton Lumber Company yard at that time. I didn’t see where that water was coming from.

Q. But you saw a stream of water coming right west?

Mr. McCARTHY: If the Court please, the witness is saying that the water was coming from the Fullerton Lumber Company. I have no objection whatever to counsel pointing to the Fullerton Lumber Company. But when he speaks of it in the [492] record, than I do object,—to saying that the water was coming from the Fullerton Lumber Company.

Mr. MAURY: The objection is untimely.

The COURT: I think so. Confine yourself to the record and do not assume anything that has not been testified to by the witness. Proceed.

I noticed that water going down the embankment, some. By “some”, I mean the same as any place in the valley there; I couldn’t tell you how much there was, but I did see water going along the railroad embankment. I couldn’t tell you how deep it was going through the viaduct as I walked down Main Street towards the Pickering pool hall; I would estimate maybe about five feet or so. It was around 7:00 o’clock that I got up on the morning



(Testimony of Anselin Zinda.)

of June 7th. At that time there was six inches of water in my yard, right at the house you are pointing to there,—yes, between the houses there.

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B. C. LILLIS,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My full name is B. C. Lillis. I live in Billings. I am a civil engineer. I graduated in the civil engineer course from Case School of Applied Science, Cleveland, in the year 1902. My first work was with the City of Cleveland building storm, water sewers, which involved a consideration of the flow of water. After a year in the City of Cleveland I entered the coast and geodetic survey for the Government and for about a year was on hydrographic work along the coast and for Puerto Rico. In 1904 I entered the Reclamation Service and for two years was on surveys for irrigation works in Eastern Montana. I then entered private practice with an office at Billings, and have been following [493] irrigation and drainage since that time, in Montana. I have held official positions; I had four years—from 1908 to 1912—as County Surveyor of this County—Yellowstone County—and two years as Chairman of the Mississippi Valley Water Conservation Commission for Montana; those two years were in 1932 and 1933. As to whether I am em-

(Testimony of B. C. Lillis.)

ployed by the Northern Pacific Railway Company or connected with them in any way, will state simply as a witness in this case; but outside of this case I have no connection.

In preparation of this case, I was asked by the railway company to make a study of the conditions as they existed at Beaver Creek, Beaver Creek Valley and the Town of Wibaux. I did so. My study of the conditions of the Beaver Creek Valley began before I was employed by the railroad company. Last June I made a study of the conditions in the valley for the purpose of use of storage of flood water, to make use of it in irrigation, at the request of the Governor of this State and under the Mississippi Valley Water Conservation Commission. At that time, I don't believe I had ever heard of any of these suits. Then in December, the Northern Pacific engineers requested me to go over the Valley. I made two trips over the Valley in December and another one in January and another one in March—this past month—and in connection with those visits through the Valley, I studied all the natural conditions of the Beaver Creek, its channel and its tributaries, and its topography, more or less of its geology, and the relation of the Creek and its drainage area through the Town. And then in connection with these cases where I have been a witness, I have listened to the testimony that has been submitted by the various witnesses.

I have been here practically throughout the trial of this case. I am able to form an opinion as to

(Testimony of B. C. Lillis.)

what effect if any, the existence of the railroad bridge and the bank had on retarding the water in Wibaux on June 7, 1929. My opinion is, I don't think [494] it had any practical effect whatever.

Q. Will you give your reasons for your conclusion M. Lillis? And in giving them, you may refer to your notes if you care to do so.

A. If I could refer to the relief map, I believe I could—

Q. Yes. You may refer to the relief map or any other exhibits.

A. Referring to the relief map and the testimony that has been submitted, particularly the testimony of Mr. Lyman; he testified that the water at the Massey place reached a depth of about 14 foot during the flood of 1929; that it just spilled over the bank at the sharp bend at the upper side of the Massey place. That water then according to Mr. Massey, he laid his pointer on the relief map, showed the direction of the flow, the direction almost directly north toward the town. At the next large bend in the creek Mr. Lyman testified, so did other witnesses,—and I measured it myself—that the bank was about 7 foot high. That 14-foot depth of water coming down the valley in the direction of that bend, 7 foot of it would be stopped by the bank. Of course, it would splash up at that point the same as at Mr. Massey's. The upper 7 foot of it would go right on over the town. Of course, it would be obstructed as it entered the town, somewhat; as it got to the buildings, the obstruction



(Testimony of B. C. Lillis.)

would be greater. At first, the force—the greatest force—would have been where the water hit the houses; they are the houses that were nearest, were moved from their foundation. When it got up into the town, it was just like another bank. That deflection would account for the Methodist parsonage floating off its foundation and floating to the east. Then Mr. Lyman testified as to the height of the highwater during the flood at the Nick Wagner building; he testified it was 2640.2; also at the Miller, or green house, it was 2640.6 feet. That shows a fall between the two buildings, a distance of 650 feet about, of  $\frac{4}{10}$ ths of a foot, which reduced to a greater fall per mile, is 3 feet and 3 [495] inches. The water continued to fall according to Mr. Lyman's testimony, at the rate of 3 feet 3 inches to the mile. There is no reason to say it was checked up by the railroad grade if it was falling at that rate. That is more fall than the Missouri River has per mile, on certain sections. Then Mr. Lyman gave two cross sections above the railroad grade, measuring parallel to the railroad and about 100 feet to the south, between the high points of the water surface or marks made by the high water. He stated the distance was about 2600 feet, and at First Avenue South the distance across, the width of the high water was 2400 feet I believe. I went up the creek and measured and had pointed out to me places that are still in evidence where the surface of the water had made the marks, were wider in many instances than 2600 or 2400 feet. I saw

(Testimony of B. C. Lillis.)

places that were measured by the railroad company engineers and I checked conditions on the ground, and I am in a position to know they were correct, and they were 2900 feet; and up at Frank Miesolski's is a place it is about 4,000 feet. Then I came to the conclusion that it was lots of places, that wide or wider, way in the creek. The depth according to Mr. Lyman, was 19.9 feet at the railroad bridge at Wibaux. I also measured a number of places up the creek for miles, where the water had risen as high as 22 feet. So, there is nothing in the evidence to indicate to me that the railroad had raised the water any; in other words, there was nothing unusual in the town of Wibaux other than what was occurring up the creek.

By Mr. Baker: (Juror). Q. Was there any difference in the width of that water at Massey's place than it was down at the green house—difference in the width of the stream?

A. Yes; the water as testified to by Mr. Lyman and also by the railroad company engineers, at Massey's place, it was about 600 feet wide. As it reached the green house the [496] banks are only 6 or 77 feet high, and it spread out over a greater width.

Q. Would that make any difference in the depth of the water?

A. It might or it might not. It would depend on how fast the velocity changed. The velocity might have slowed up just so you might be able to keep

(Testimony of B. C. Lillis.)

the depth of the water the same. And the testimony of Mr. Lyman indicates that that is what happened. The water at the green building was 2640.6 and in the creek somewhere near there, it was testified to or agreed to 2626.—something; there is about 14 feet difference.

I believe that covers the comment I wanted to make as to the reasons for my conclusions.

I computed the number of cubic feet per second that went through there at the time of the flood. I computed the quantity at quite a number of different places in order to see about how they averaged. The quantity which I considered the most accurate, and the reason I emphasize, it was figured at the point on this relief map about as I have shown on the map here—just below Massey's, crossing the map about as I have shown, and it is 600 or 700 feet down the creek from—no, here is the place—to what is known as the "horse island" there. The first reason I feel that that cross section is right at all is that it is nearly at right angles to the direction of the flow of the water, as testified to by Mr. Massey; it is quite a uniform cross section,—there is not much brush,—not many trees in this section of the creek at that point; and that it is at a point where several points of high-water elevation had been determined close by; and computing the quantity at that point, I figured the quantity of water flowing by there was about 36,000 cubic feet per second. As to how cubic feet



(Testimony of B. C. Lillis.)

of water per second is computed; it is determined by using two factors,—the size of the area or cross section of the water,—multiply that by the speed of the water. [497] The speed or the velocity of the water is determined in accordance with certain formulae, and as one of the factors in connection with the use of one of those formulae it is necessary to get the slope of the stream you are measuring.

Q. Did you hear Mr. Lyman's testimony that he got the slope by taking the elevation at a point where he was measuring in the vicinity of the Massey ranch and the second point he was downstream in the vicinity of the Miller house? Did you hear that testimony?

A. Yes.

Mr. MAURY: We say your statement as to what Lyman says is not correct.

The COURT: You will have an opportunity to show it is not correct.

In getting your slope, as to whether you should take a point below or take a point above, will say that you consider all of the conditions existing in any case of course, but in general, to get the real grade of the water which is the fall of the surface, you take a point at the point you are considering the cross section and then use the point wherever the conditions were the same, above or below. In a restricted area like that at Massey's, the velocity at the section referred to was influenced more by

(Testimony of B. C. Lillis.)

the grade of the water above the point than it was below. So it would be more accurate to determine the real grade of the water, to take a point above Massey's than taking a point where his section was taken.

Q. Did you notice the testimony that the reporter has read with reference to his having taken points in the bed of the stream—two different points, for the purpose of ascertaining the grade, slope, and in the last answer here you spoke of the surface of the water. What is proper, in your opinion, in ascertaining the slope,—to take the two points in the bed of the creek, or to measure the difference in the elevation of the water at two [498] different points?

A. The proper way is to refer to the surface of the water; that is the hydraulic grade, that is the amount the surface drops.

Q. Juror No. 12 (Mr. Baker?), asked you a question here. Where was the cross section on the relief map that Mr. Oien used and which you got the 600-feet, point out approximately where that was.

A. It was running from near the Massey barn with the direction amost parallel to the channel of the creek at that particular bend not quite west of there. I don't know whether I can explain it any more fully or not, or comment a little more fully on the question propounded to me by Juror No. 12 (Mr. Baker)—as to the amount of water coming down there past Massey's and the effect of pass-

(Testimony of B. C. Lillis.)

ing over the area before it reached the town,—but it is apparent from the position the ruler is on the map, the water was coming through a section where it was restricted to that 600 feet by the height of the banks on either side. As it passed that point, the valley widened out, and down in the section where I computed the flow the water surface measured only 1700 feet on top; that is only 660 below where it was at Massey's; the point is 1700 feet wide across the surface of the water. The difference between the 1700-foot width and the 600 feet was about 1100 feet. As to whether that water would or would not go into the town in between the city water tank and the green house—along in there, will say there was nothing else it could possibly do; considering the direct flow, the height of the bank at the city water tower, about 7 feet of that water would have to go on through the town. As to whether I would want to say that all of that water, or part of it, or what would go into the town there,—it is clear what would happen; the water below that 7-foot elevation would be deflected by the bank and on east and on down the portion of the creek; that portion above the 7 feet would come on down through the town. [499]

Q. Would any of it spread out so that additional 7 feet would be lowered, or what would happen in your opinion?

A. As it reached the portion of the town the buildings begin to be closer together, it would have



(Testimony of B. C. Lillis.)

a tendency to be thrown to one side of the buildings. For instance, the first block north of the Mattie Miller house, then there are buildings built almost the full area of the block,—same thing as a dam. Then when you get down to the block Nick Wagner's building is in, it is practically a solid dam on the east side and practically a solid dam on the west side. The tendency would be to throw the water both ways and shoot it down the street. Now, the juror was asking about the depth of the water. The depth at the Mattie Miller house might have changed considerable due to the area of the cross section,—if conditions had been right, it might have been—but the testimony shows it didn't change materially; the testimony shows it was about 14 feet still. As to whether a flood of the proportions of the one that struck Wibaux on June 7, 1929, could be taken care of by any railroad bridge, so far as damage south of the town and so far as the railroad embankment is concerned, will say that all the analysis I can make from all the facts assembled, makes me say that the condition on that portion south of the town would have been practically the same if there had been no railroad embankment there at all.

Cross Examination:

(By Mr. Maury).

I didn't say that I had read all the testimony that had been given in these cases; I said I had

(Testimony of B. C. Lillis.)

heard the testimony. I don't believe I said that I had read the testimony. I have read some, however. I did not base my opinion partly on testimony that I have read. I read part of the testimony of one Dean Shenehon, given at the first trial.

Q. And did you read the portion of his testimony appearing on [500] page 967 of the record which I hold in my hand—

Mr. McCarthy: Objected to as immaterial, if the Court please. This witness was not a witness in the Heckaman case and what he read——

The COURT: Well, the witness says he read that testimony and in his study of the case,—is that correct? Did you read that testimony?

Mr. McCARTHY: May I ask a question as ground for my objection? (Mr. MAURY): We object, after the Court rules.

The COURT: I will permit him to,—as to on what he bases his opinion for the testimony in this case.

Mr. McCARTHY: Q. Did you base your opinion upon any testimony that was given by any witness, whose testimony you may have read, as given in another case?

The COURT: I understood he said “from what he had read.” Overrule the objection.

Q. Did you read: “Question: Dean, what sized bridge would have taken the flood of——”

Mr. McCARTHY: I object to counsel reading that testimony——

(Testimony of B. C. Lillis.)

The COURT: Let him submit it to the witness and let him read it.

Mr. MAURY: Read line 13——

The COURT: Read it to yourself first, if you want to.

(Witness reading): “Q. Dean, what sized bridge would have taken the flood of 1929 at the same level as the flood of 1921 rose to—what length of bridge? A. Including the viaduct?

Q. Well, including the viaduct, we don't admit that anyone can use a county road for a spillway, but leaving out the viaduct, Dean. A. I don't believe I could give you that very definitely. I might say if the flood of 1929 was three times or  $2\frac{3}{4}$  times, we would need a bridge and viaduct two or three times— $2\frac{3}{4}$  times the length. I shouldn't say for bridge alone. I would say [501] under the extraordinary conditions of 1929, it is entirely proper some water should flow through the viaduct.

Q. How much of a bridge would we need? A. You mean assuming there was no viaduct?

Q. First, assuming there was a viaduct there. Assuming that the same viaduct that was there then in 1929. You see, the viaduct has been changed now too. A. Well, I think if we say that if we had a viaduct capacity plus the bridge capacity— $2\frac{3}{4}$  times the capacities we had in 1921, it would have carried the water.

Q. Yes, sir; and without any loss or damage to property in the town at all. A. No more loss or damage than would have occurred in '21.



(Testimony of B. C. Lillis.)

Q. And now, will you adjust the slide-rule there, Dean, and tell us what a bridge  $2\frac{3}{4}$  times as long would have amounted to—65 feet— $2\frac{3}{4}$  times 65 feet, on the slide-rule, Dean? A. I am including the space between the abutments; a bridge 290 feet long, in the clear.

Q. Dean, will you adjust the slide-rule and tell us how much  $2\frac{3}{4}$  times 65 is? A. About 179 feet.”

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That testimony absolutely did not go into the making of my opinion. I understand that Mr. Shen-ehon was an expert for the Northern Pacific at that trial.

The dam which I spoke of, which the buildings made—some of the buildings—appears in plaintiff's exhibit 21; and the dam which I spoke of, that the buildings made, as to some of them at least, appears in plaintiff's exhibit 23 (counsel showing exhibits to witness). We are looking at the dam from the north side. The Pickering pool hall (which you pointed out to me at my request in exhibit 23) hardly constituted a part of the dam which I spoke of; that would be a portion of the dam, but not the part that struck the water; the south end of that block would be the [502] face of the dam the water would hit. I see some of the buildings on the south side of the block (in exhibit 23), on the east side of the street. They constituted the dam of which I spoke.

(Testimony of B. C. Lillis.)

I didn't take into consideration the testimony of John Presthus, the section foreman there, that the water stood 10 feet higher on the south side than it did on the north side of the fill; I didn't use any information like that in reaching my conclusions or in making my study. I simply used the testimony of your own witnesses to draw my conclusions. I didn't take into consideration the testimony of Mr. Oien that there was a different high-water level of marks on the north side of the railroad from what he found on the south side, and particularly at the Sutherland oil station; that didn't enter into the problem I was solving. I didn't take into consideration the testimony of William Lentz that there was a difference of 10 or more feet between the high-water marks at his place,—somewhat off the model, and the high-water mark at the Sutherland oil station; that didn't enter into the problem.

As to the exact factors that went into computing the amount of water at the cross section here, north of Massey's, which I spoke of,—the factor of width was about 1700 feet; the factor of depth—that is a varying factor, it would have to be worked out. It wasn't averaged for me by Mr. Oien; I figured it myself from Mr. Oien's cross section, which is in evidence here. My factor for "A"—"A" for area—was 9290 square feet; I used a factor for "N" of .05; the factor for "R", 5.3 feet, and the factor for "S" is .00125. I applied Kutter's formula to determine the volume of water at that cross section

(Testimony of B. C. Lillis.)

that flowed by at that cross section on the morning of June 7th.

Q. Mr. Lillis, will you apply the same factors, except the factor "A",—take the factor "A" from Mr. Oien's cross section, defendant's Y-4. It is on First Avenue South in the town,—and tell [503] us what results you get? Here it is. That is the section on First Avenue South?

A. I have figured that out Mr. Maury, but I wouldn't use it. The result that I got when I figured it out was 32,000 cubic feet per second. I didn't use the same factors with the exception of "A"; you can't use the same factors.

Q. Now, will you use the same factors, with the exception of "A", and taking "A" from Mr. Oien's plat, tell us what results you get?

A. I wouldn't have any confidence in those results.

Q. Tell us. We might have confidence in it; and somebody else. Take those same factors.

Mr. McCARTHY: We object to that. The counsel might just as well ask him that assuming that four plus four equals ten, and so and so. We object to it as being an improper question.

Mr. MAURY: We will show that the grade was the same right there as it was up where he took it, and that the same factors should be used at both places, approximately.

A. I would like to explain Mr. Maury, why I can't use it. There is the highway bridge that wit-



(Testimony of B. C. Lillis.)

nesses testified was obstructed during part of the flood. There is all those buildings to the west of the highway bridge. While you would get a depth in an area of water, there is no way of figuring accurately the water in the entire cross section; it might have had a hundred different velocities. I didn't have Mr. Oien compute for me the exact area that should be deducted from that; I didn't have him do that for me on the cross section on First Avenue South, of the flood of June 7, 1929,—I haven't had Mr. Oien do anything for me. I did observe this cross section and observe the figures on it, if that is what you mean? And my cross section up here 600 feet or more south of Massey's was from a survey Mr. Oien made for me; and he gave me a survey down here on First Avenue South, and many others. There isn't just as much reason for using a survey and figuring the amount of water flowing by this cross section [504] that I have in my hand as there was at this point up here; I would say that there is not sufficient similarity of conditions of the two places. As to whether one of the conditions that would not be similar was that there was water flowing backwards here, will say that I had no understanding that that was the case.

Q. You didn't get it from any witness that there was water flowing backwards?

A. If water came down that stream, it never turned around and went back up; that is against all laws of nature.

(Testimony of B. C. Lillis.)

Q. Do you recall at the door of the courtroom now used by Judge Goddard, 27 years or more ago, while a case was going on against the Montana Power Company, telling me that in all cases, water, when obstructed by a dam of any kind, was backed up beyond the contour level?

A. That wasn't the same kind of a case or condition. I don't remember telling you that, but I remember what the case was; that was a case of a dam across the river and water going the whole length of the crest,—that is an entirely different case.

Q. And in that case, you told me there was always back-water beyond above the level of the contour?

A. If you mean by the "level of the contour" the "crest of the dam", yes, that is true.

Q. And you told me that that existed usually in large streams—how this was said to be on June 7th—three or four hundred yards above the point where the level of the dam would stop, did you not?

A. Of course, I don't remember my words of 27 years ago, but the conditions would have to be analyzed in each case, Mr. Maury. There is such a thing as back-water beyond the level of the dam; and it extends frequently in many cases, a considerable distance upstream, and the distance that it extends upstream depends on the local conditions. If that back-water is not apparent to an observer,

(Testimony of B. C. Lillis.)

it is true that it is determined by scientific measurements. An observer can't tell that just by looking at it,—of measurements,—oh, he can see the results or effects, if it is marked, but he can't make any exact measurement with [505] the eye of the level of the dam and he can't make any exact measurements of where that level would be upstream, so that back-water is always subject to analysis and opinions from text books—well, it is a rather complicated problem.

Q. Did you in using Kutter's formula, using the same factors except that you used the area of the cross section at First Avenue South instead of the area up here 600 feet north of Massey's, and find that according to those figures, the flow of water past First Avenue South was 87,000 cubic feet per second?

A. No, sir. As to what I did find, I am just referring to my notes on it.

Q. What was it? Well, did you make any computation using all the factors as the same for First Avenue South, except the area, or did you not?

A. My figures show that I did not complete the computations. Oh, by the way, I see some more figures here Mr. Maury; I would be glad to give them to you. This is section 11, is what it is called; that is the cross section at First Avenue. The computations at that section that I figured shows 46,000 cubic feet per second passing that point, but I didn't use them and wouldn't use them, because of all these obstructions and interferences which



(Testimony of B. C. Lillis.)

changes the direction of the current. As to whether I had no belief that 46,000 cubic feet ever passed that cross section or not,—well, it didn't make much difference whether it did or not.

Q. I am asking you Mr. Lillis, you had no belief when you got the result of those figures there, that 46,000 cubic feet of water ever passed that point per second, on June 7, 1929?

A. Well, I didn't consider very seriously whether that was the figure or not, because I understood all the conditions which made that figure inaccurate and unreliable, and I decided not to use it. As to what the conditions were that made that figure inaccurate and unreliable, well the highway running east from the bridge I consider like a weir; the water went over that. Whether that would stop [506] it or push it faster, will say it had both effects; and then the bridge itself is an irregular cross section. It was testified that water came from where the parsonage was and flowed east and then to the bridge.

Q. What was the grade that you used when you made that computation?

Mr. HALL: If the court please, we think the witness should be permitted to finish the answer. He was trying to explain it.

A. The grade I used was what we called .007. That is one point greater than Mr. Lyman used on his computation at Massey's. I didn't get that grade from Mr. Oien; I took the elevation of the high-water at two points as near as I could there, I

(Testimony of B. C. Lillis.)

don't remember what they were; I can reduce that grade for you to feet-per-mile; it is about 3.9 feet to the mile. I did, in my reading and hearing of testimony given in this case, take into consideration the width of the high-water mark at Burke's place. As to what figures I took for that—the width—will say that I worked out an area (I don't show the width across the top here; I took it off of one of these cross sections); the area was——

Q. A cross section for Burke's place?

A. Yes. The area of the water at that point was 4427 square feet; the maximum depth was 16.4 feet. I mean by that, the rise of water above the low-water in the creek; the velocity was  $4\frac{1}{2}$  feet per second. The discharge I computed was 35,000. I made a computation at this point which I speak of below Massey's; I made that 36,000, and I made a computation of some kind at First Avenue South and I got a result of 46,000. I think practically all of the water that went by First Avenue South came by my cross section 600 feet north of Massey's on the day of June 7, 1929,—I don't remember that anybody saw any—don't remember whether anybody saw any coming down Possum Hollow at that time or not. All the water that came by my cross section 600 feet north of Massey's, came [507] down by Massey's, and all of that water came down by Burke's, except what came in the small drainage area—what is known as number 12. At Burke's P was 420; reading what the last three

(Testimony of B. C. Lillis.)

figures were of the computation at Burke's—you wish the factors "A", "V" and then quantity, "Q"? "A", area, 4427; "V", velocity,  $4\frac{1}{2}$  feet per second; "Q", quantity, 35,000. I didn't get the result by multiplying "A" by "V"; I got the result by averaging that section with the next section below it. The next section below that, that I am talking about, is one that is number D-5.

Q. And whereabouts would it be? I doubt if our exhibit numbers fit into that number.

A. No, it don't; it was below Burke's about 3,000 feet; by "below" I mean down the valley. I don't know whether that is in evidence here. Those two I believe I averaged together to get 35,000.

Q. Now, what was the factor for Burke's alone?

Mr. McCARTHY: Q. The answer—what did you add from Burke's? You added two things together?

A. 4427 and 7447.

Q. You added those two together?

A. And divided by two, and that was my factor?

Q. And the factor "A" which brought out 35,000 was not 4427, but was the average of 4427 and—what were those other figures 3000 feet away?

A. It is about 3000 feet. The two figures that I added together to make the average area that I used in computing the flow by Burke's were 4427 and 7447. Of course, that wouldn't give the flow at Burke's independently; it would give the average in those two sections. I didn't use two sections down below to get an average flow here, 600 feet north. I



(Testimony of B. C. Lillis.)

didn't use two there because I didn't need to; I had one good section and I had elevations on the top of the water at two places very close together—they weren't 3,000 feet apart. As to whether Burke's was not a [508] good section, will say that it would have been a good section—it would have been like that one at Massey's if I had an elevation upstream from Burke's but I didn't have it. I would like to have had an elevation upstream and downstream both, to have had much confidence in those figures.

Q. Then at Burke's you did not use just the slope downstream, or did you use it and weren't satisfied?

A. That is the idea; I didn't report my figures, because I wasn't satisfied with them. It possibly would have led to greater correctness, I would have felt, if I had a measurement upstream from that point as well as downstream. I used a grade-per-mile in that computation at Burke's; the grade-to-the-mile that I gave was a little over 7 feet. I don't know as you can give the average fall of that stream to the mile; it is different as it comes down the valley, and as the valley widens and narrows, it varies all the way along. I don't remember whether Mr. Oien and I talked or discussed about what he considered the average fall of that stream from Brophy's to the railroad fill, or not.

Q. Would you say that the fall of the river bed at Burke's was steeper or not so steep?

A. You mean the bottom of the river?

(Testimony of B. C. Lillis.)

Q. Why, I mean the water at low level, at low-water.

Mr. McCARTHY: Compared with water at what level?

Mr. MAURY: No, you don't compute the fall of the stream per mile by water at low level; you compute it with water at low level upstream and water at low level downstream.

A. Well, I would have to say that in computing the water at the time of the flood, you compute it from the water surface during that flood. If there is no back-water, that level would not be substantially parallel with the level at low-water; there would be a difference varying with the change in the width of the valley at the different points, and that changes rapidly—quite suddenly. As the valley narrowed up, the level of the water [509] would not necessarily rise; the tendency would be to rise, but it would be dependent on the way the banks confined it and how the cross section changed; it might continue to be the same depth exactly and change its velocity two or three hundred percent. My observation of the creek channel and banks at both places,—Burke's and Massey's—indicates to me clearly why it was that, according to Mr. Oien's figures, the rise of water seems to have been greater at Burke's than it was at Massey's; the water was confined at Burke's between high banks that were only a little over 400 feet apart; at Massey's, they are about 600 feet apart.

(Testimony of B. C. Lillis.)

Q. Yes; and as it spread out, then the rise grew less?

A. No; that was influenced by the natural variation in the grade of the creek and natural width—in other words, it followed the line of least resistance, always.

Q. Always? And now tell us why the water would not slow up at the cross section to the north of Massey's from what it would do as it passed by Massey's?

A. It undoubtedly did slow up. From the contour of the land there as I have seen it, as to how much in my opinion it did slow up (you realizing that accuracy on that is impossible, and just wanting my opinion), I would say it slowed up something in the vicinity of one foot per second in its speed, in about 660 feet.

Q. And if it was going, (I don't know what it was going at Massey's), but if it was going four miles an hour at Massey's—that would be six feet per second—then when it got 600 feet further down, it would be going five feet per second or——

A. Approximately that. When the water got below my cross section—the cross section 600 feet to the north of Massey's—there was nothing to the east in general that turned the water in a westerly direction; the direction of that water continued according to Mr. Massey. According to Mr. Massey, the direction of that water continued approximately down towards that water tower from his house irrespective of those [510] curves of the



(Testimony of B. C. Lillis.)

creek, because it wasn't following the curves; it was filling the whole valley. Where I took my cross section the average is about five feet across that flat.

Q. Did you get an average here? (I am going to call that the cross section "M"; that is the cross section to the north of Mr. Massey's), how many feet is that?

A. It is about 660 feet. At the cross section M, I can't give to you the average depth—in an average, because——. I spoke of an average depth of five feet; that is about what it was across the flat.

Q. Yes; from high-water mark to high-water mark of June 7, 1929, that is the average you intended to convey to us?

A. Yes. That was not the average which I used to compute the area; I computed the area by getting the depth at each point where the slope changed; they probably averaged 100 foot apart and I took the depth at each one of those points. For my computation I used mostly rectangles, but I did find that I had to use triangles as I came to the bed of the stream. As I went up from the bed of the stream I didn't also have to use triangles,—I think they were all rectangles,—no triangles there. It wouldn't have been a little more accurate to have used triangles on the bottom, no.

I recall the contour of the ground by the Cramer house (you are pointing to a house between Massey's meadow and the Ostby house—that one with the dyke there). I don't remember the elevation of that ground through there by the Cramer house.

(Testimony of B. C. Lillis.)

Q. As you stood here viewing your cross section, can you recall how that looked, and whether you could see Ostby's or this house to which I am pointing—this Sletten house that has been identified—whether you could see this point here or the Sletten house, or Ostby's, when you were working in Massey's meadow?

A. No, I don't remember that in detail; the country appears just as it does on that relief map; it slopes just as it is done there.

Q. And you have found that the elevations are usually done with [511] exceedingly great care?

A. I haven't discovered any error in it. The elevations are as near correct—as nearly as people in the engineering business can make them, and I think at the cross section M or any point on the cross section M, you can see Ostby's house where those hills are around here, or Sletten's house; I think I could see across there; there is not a whole lot of difference in the slope, and speaking about the elevations here at Cramer's house and whether that is to the north of the cross section M, will say that it is about as shown on that map; that is about correct. I didn't get any at Cramer's house; as to whether any were submitted to me for the one of June 7, 1929, will say that is a point I didn't pay much attention to that I remember of.

Q. Mr. Lillis, is there anything in the ground there that you could see, or any figures that you got from Mr. Oien or anyone, that changed the grade

(Testimony of B. C. Lillis.)

of the stream from the cross section M to the point right by the water tower,\* I mean is the ground of the stream from about opposite Massey's place to the Senator Kinney dyke,—is there any great change in the grade of the stream from between those two places?

A. I know that from the section I took, down to the Kinney house, there wasn't any appreciable grade in the surface of the water during that flood.

Q. Certainly, there was no appreciable change in the grade.

A. I mean change of grade.

Q. Surely. Did you hear Mr. Oien's figures giving about what the grade was from the Mattie Miller house—the green house—back up around the meanders up to the Massey place?

A. Yes. So far as I know, they were correct as he gave them. I believe I heard the figures given by Mr. Oien for the change in grade, or rather the fall of the creek, from Mattie Miller's around to the county bridge. As to whether I accepted them in all my calculations as being correct, will state that I didn't use those figures in my calculations; I used Mr. Lyman's figures. [512]

Viscosity, I think, would be the tendency of particles of fluid to cling together; capillary attraction is a different phenomena; it is the tendency of different kinds of material to cling together; drops coming out on a glass of ice-water, that is condensation, and not done by capillary attraction.



(Testimony of B. C. Lillis.)

Q. Mr. Lillis, you mentioned in your direct examination using a factor and saying that Mr. Lyman said that the elevation of the rise of the water at Massey's was 14 feet. If Mr. Lyman actually said it was 11 feet and a fraction, would that change your calculations and your opinion?

A. My computations are based on the actual elevation of the surface of the water as given at that point by Mr. Oien.

Q. But you said you took into consideration that Mr. Lyman had said it was 14 feet at Massey's and you differed from Mr. Lyman,—didn't you say that on direct examination?

A. I understand Mr. Lyman says the depth was 14 feet.

Q. That is what you are basing your report on is it?

A. That is one of the factors. I measured that myself and I checked it up myself, and I know it is true.

Q. If Mr. Lyman did actually say the rise at Massey's was 11 and a fraction feet that would change your views from his wouldn't it?

Mr. McCARTHY: May I ask? I think counsel is confusing the depth of the high-water raise and low-water,—I think it is confusing.

The COURT: Well, straighten him out on re-direct examination.

As to whether a wave moves any water forward, except a tidal wave, or whether it merely lifts it up, will say there are two kinds of waves,—there is

(Testimony of B. C. Lillis.)

the kind that lifts it up, and there is the translation that actually moves the water horizontal.

Q. In fact, a wave may cross the Atlantic Ocean in about seven hours and a feather that struck in midocean, would not be moved forward two feet?

A. I don't know.

Q. Just rise up and down. [513]

A difference of 3 feet, or an assumption for my calculations, in rise of river at Massey's would make some difference in the amount of that overflow that I described in going over the town; it might make 3 feet difference, and might make another difference because, as the altitude of water increases, so does the speed. Burke's house is on the same side of the creek as the plaintiff, Nick Wagner's property; I know that no water did get into Burke's house. Two miles or more, probably something like that, south of Wibaux is Clem Parker's place—3½ or 4 miles south of Wibaux; I went to that place and asked where the water was; I believe that no water on June 7th, had entered Clem Parker's house—I am not positive about that—I believe not. That isn't part of the information upon which I gave my opinion this morning. I don't know how close a cross section was taken to Parker's. I don't remember noticing any house over there right across the creek from Massey's on the west of the bank there; I didn't go to that house and inquire about water marks—I didn't see any house there, but there may be one; I don't know a

(Testimony of B. C. Lillis.)

house that was occupied, and occupied now, by Mr. and Mrs. Coyne,—I didn't go to the house. I didn't figure it at that one cross section at Burke's place—using Kutter's formula to get a flow of about 18,000 cubic feet per second—because I didn't have enough information to figure that one cross section at Burke's; I had all the information including the elevation at Burke's; the elevation at Burke's with respect to rise of water—the height that the water rose at Burke's first, I think was  $16\frac{1}{2}$  feet. Other information that was useful for Kutter's formula that I had at Burke's, was the area,—it was 4,000 and something,—4427 was the area shown inside of the cross section that was given there. I think the reason I didn't use that Mr. Maury, I found out after I got on the ground, there was a lot of water going through a swale to the west that the cross section did not [514] include. That area was on one of those cross-section plats that Mr. Oien prepared. The velocity that I used at Burke's, as near as I could get at it with that information, was about  $4\frac{1}{2}$  feet per second; I had to assume that by taking another section—that is what went into this,  $4\frac{1}{2}$  feet per second at Burke's. That area multiplied by that velocity, would be something like 20,000 cubic feet,—coming closer, 19,800. It is possible that I could have gotten the dimensions of the water going through that swale at Burke's, but there was no way of telling what grade the water had at that point; there was too many indeterminate factors for



(Testimony of B. C. Lillis.)

me to figure the flow there and feel that I wanted to say "there was so much". As to whether much of the water in that valley sinks into the ground, will say that is quite a general question, Mr. Maury; water will sink into ground to the capacity of the ground to hold it. Of course, after long rains, the ground was pretty well saturated,—that was the condition that obtained at that time. In my consideration in regard to steady rain in that valley, I was going back just about one day's time; I know there was at least one day before the 7th; I had not inquired about climatic conditions for a week or two before; I wasn't interested in time previous to the day or so before; there is always though, a great deal of water sinks into the ground when it gets outside of the banks of the stream, that is a general condition, that is true. I didn't say that there was less water going by Massey's than was going by Burke's. I wouldn't say that the speed of the water at Massey's was slower than it was at Burke's on the 7th of June, 1929,—the information I have wouldn't indicate that it was slower. The grade I used at Burke's was 7 feet to the mile. I have taken into consideration the grade slightly above Massey's and slightly below. The grade that I assigned opposite Massey's place, I think was about 6.6 feet to the mile. On that basis then, there wasn't any substantial variation in the grade so far as I [515] got it, between the grade at Massey's and Burke's; the information I have doesn't indicate much difference. As to whether I would not say that the

(Testimony of B. C. Lillis.)

speed of the water at Massey's was slightly less than at Burke's, my judgment would be that it was, except that it is indeterminate of that portion at Burke's that was going out through the swale.

Q. You would say that it had a less speed than 3 miles an hour at Massey's, having given Burke's 3 miles per hour?

A. Now, in speaking of the speed at Massey's, I don't want to confuse the information I have given; the point I am referring to is about 660 feet below Massey's. Considering the information I had at Burke's, that speed there was not considerably less than at Burke's; I didn't find much difference—considering the information I had at Burke's. The information I had at the cross section M, I had the elevation on the surface of the water at two points within 660 feet of one another, and that is about five times as close as the points I had at Burke's.

Q. You spoke of the grade of that river in your direct examination. What did you say? What is your idea of the average grade of that river from the railroad bridge back up to Brophy's?

A. Well, now that is a pretty good question; I don't know as I can answer it. I have actual elevations at certain specific points Mr. Maury. Now, I had no reason to worry about what the average grade was. I have heard testimony here that it was about 12 feet per mile—the fall of the valley—that may not be “about right”; that may be “just



(Testimony of B. C. Lillis.)

right". That wouldn't be considered steep for a creek. As to what the difference is between a creek and a river as found in the United States terminology,—whether a creek is something that drains less than 100 square miles—will say that I never saw any exact definition of that type. And whether a river is spoken of in the Geodetic Survey as a drainage area of more than 100 square miles,—as I say, I don't [516] know; I never saw the definite figures applied. I think it is a general term. As to why I was speaking of the Missouri and its grade, I had in mind when I was speaking of points on the Missouri River between Great Falls and its head at Three Forks; you can't give an accurate average grade; it varies so markedly. Giving it at some of the places, will say that opposite the town of Cascade, it is less than 3 feet to the mile, I know that; there is points at Townsend where it is about 3 feet to the mile. Of course, some places, where there are cascades and waterfalls, that it is immense. I don't know about whether the Ohio River runs to Cairo about 4 inches to the mile.

The COURT: Hurry along with your cross examination. Let us get at the real facts here and develop something.

A wave is a vibration—vibration of anything you would call a wave; generally speaking, it is a vibration up and down, of water. I don't know whether a wave may run 700 miles up the Amazon without moving any water up the stream at all. As to whether waves as a general thing, will only move



(Testimony of B. C. Lillis.)

water up and down, will say there are waves of translation which will move water horizontally; they are tidal waves—or a wave of water coming down a creek would be called a wave of translation. I would have to see it to know—whether a wave going cross-wise of a creek would be a wave of translation or a wave of vibration. I know that the wind makes waves on lakes in Montana in very ordinary storms,—make such waves as turn people over in rowboats and drown them.

Q. Mr. Lillis, have you considered the testimony of Robert Massey that the water remained at the same stage at his house until 3:00 o'clock in the afternoon of June 7th, or approximately the same stage?

A. I heard him state how it fluctuated during the day.

Q. And if that testimony is accurate, how can you account for [517] there being no water on the streets of Wibaux at 3:00 o'clock in the afternoon—at least no water except mud and debris that had been left there?

A. Well, I don't know as I would attempt to account for that; that wasn't any factor that entered into the problem that I was analyzing this morning, whatever.

Q. Yes. And suppose that for 20 miles to the south of the railroad fill, or 18 miles, at 11:00 o'clock in the morning of June 7th, the water was still coming as big as the Yellowstone at Sidney,

(Testimony of B. C. Lillis.)

how would you account for that not creating the same rise of water in Wibaux? Did you hear the testimony of the gentleman in the airplane?

A. Yes.

Q. How would you account for the fact that that water, coming at the rate of three or four miles an hour by Burke's and by Massey's, did not cause the same rise of water at Wibaux that the previous water had?

Mr. McCARTHY: We object to that question on the ground that it is assuming something that Mr. Combes didn't testify to—namely, that the depth of the water was the same. The aviator didn't attempt to give any difference in depth during that period; he was just giving the general appearance.

The COURT: As I recall, he testified as to the appearance from his plane, of the stream or the area covered by the water.

A. I would account for that by the difference in the velocity of the water.

If the area of water in that valley remained approximately the same, the depth would remain approximately the same too.

Q. And the depth makes the velocity?

A. The velocity is influenced by the amount of water coming on behind it.

Q. Did you take into account in general, answering the general hypothetical question of counsel this morning, the deposition of Senator Kinney to the effect that six or eight times, the water had backed

(Testimony of B. C. Lillis.)

up to be a quarter of a mile on the east of the fill [518] while he lived there at Wibaux?\* Did you take that into consideration?

A. I don't remember what the question was I was replying to Mr. Maury—you mean when I said there was no backing up? That the fill made no difference in my opinion, in the elevation of the water in Wibaux on June 7th? Well, what I was saying was, that the water had gotten over that part of Wibaux before it ever got to the railroad track, and it would have done so whether there was any railroad track there or not. I didn't take into consideration testimony that the water was going through the viaduct four or five, or even three, feet deep, coming from the east, and some coming from the west, before it got opposite Wagner's property at all; I didn't have to take that into account; I did not consider that. In solving my problem, that was all taken care of by the elevation of the surface of the water at the points which I used,—in other words, the surface of the water would have been and probably was, affected by all of those conditions; but I simply used the fall or drop in the surface of the water, which is the thing that determines the velocity and its flow. As to whether I took into consideration testimony that was read, of John Bailey, that water was backing up behind this building and came in from the north to the south, will say that I remembered that statement; I didn't take that into account,



(Testimony of B. C. Lillis.)

because I didn't feel I was justified in taking into account. I didn't take into account or consideration the testimony of Miss Webber, the telephone girl, who said the water stood behind the telephone office here coming up from the north to south for half an hour before it got onto the street in front of the telephone building.

### Redirect Examination

In the course of my study I went down on Wibaux Street in the vicinity of both the Pickering pool hall and south of there, and also north of the railroad embankment in the vicinity of the community club or Congregational Church. The elevations [519] at those two places with reference to slope, will say that the ground falls to the north about five feet between the Congregational Church on the north of the track and the pool hall on the south of the track; the pool hall on the south side of the track is five feet higher than the ground on the north side. As you assume, water seeks its own level. If we put one foot of water on the ground on Wibaux Street in the vicinity of the Pickering pool hall, I wouldn't expect to find more than one foot of water down at the lower grade.

Q. And in getting the elevation of the high water north of the railroad embankment and south of the railroad embankment, is it in your opinion, proper to deduct the elevation to get a correct picture of the situation?

(Testimony of B. C. Lillis.)

A. Well, that should be taken into account, of course.

Q. Now, Mr. Lillis, you were asked on cross examination here about the difference in elevation in high-water level above and below the embankment. Having in mind that that is a fact, how do you reconcile the fact that if there was a difference in elevation of water on the two sides and your statement that the railroad embankment played no part in the damage at Wibaux?

A. I say the water had to go through the town of Wibaux before it reached the track.

Q. Mr. Lillis, you spoke of a 14-foot depth at Massey's instead of an 11-foot depth counsel insisted on at the Massey place. Now, have you checked over the exhibit as to what was accepted by Mr. Lyman? Have you a copy of that exhibit?

A. Yes. That shows that the water was 14 feet deep at the Massey place. So the record will be clear,—in making the last statement, I had in mind the defendant's exhibit D-11, with particular reference to the last two items on the exhibit. The first one is the elevation of the high water June 7, 1929, about 200 feet west of Massey's house; the elevation given is 2643.5. The second item [520] is elevation bottom of creek about 180 feet southeasterly from Massey's house; the elevation given is 2629.3. The difference is 14.2 feet—about 14 feet even, I think; I can't tell whether that last figure is 3 or 5; it is either 3 or 5; it is either 14.2 feet or 14; that is

(Testimony of B. C. Lillis.)

in the one-tenths. Assuming it is 3, there would be a difference in the elevation, or in the rise of that flood, of 14.2.

My attention was directed to testimony in the case by a witness named Shenehon, in answer to a hypothetical question. In looking over that testimony, in my opinion, all of the factors were not present, so to answer the question at present. As to what was absent: the fact of height of water in 1929 and 1921 and the speed of the water. By "height" I mean—that is the same as depth.

I was present at Baker, Fallon County, Montana, in District Court, in January of this year. I heard Mr. Lyman's testimony on direct examination in that trial. I recall of your requesting Mr. Lyman to accompany Mr. Oien and make some further checks as to elevations, and I was present when it was complied with, and also present when Mr. Lyman returned. As to what difference, if any, was found in the vicinity of the Massey place on return, after Mr. Lyman had checked his figures, will state that Mr. Lyman and Mr. Oien agreed that the elevations given in this exhibit D-11 were the correct elevations.

Q. Now, were those corrected elevations before Mr. Shenehon when he testified one or two years before the trial of the case this year?

Mr. MAURY: We object. Mr. Lillis isn't capable of answering that.

Mr. McCARTHY: This witness was asked about the Shenehon testimony this morning in the cross



(Testimony of B. C. Lillis.)

examination. I want to show where the error came in. [521]

A. Mr. Shenehon never used any of Mr. Oien's—Lyman's figures.

The COURT: Overruled.

A. Shenehon didn't have Lyman's figures; the figures were not corrected as to Mr. Lyman's elevations until January of this year. The extent of that correction with reference to high water at Massey's was three feet and a fraction,—three feet or three feet, plus; it was over three feet. Three feet on a volume of water would increase it greatly.

On cross examination this morning, I was asked about the average depth of water across the flat at the location of the section north of Massey's place. I think I answered approximately five feet. As to whether I was referring to the entire cross section or only to the flat, will say I was referring to the water-depth on the top of the flat outside of the creek-channel proper.

This morning, when asked on cross examination about the rate of fall between the Massey place and the bend of the creek, I think I said it was very slight; I didn't have reference to the difference in elevation; I was referring to the rate of fall.

Q. Mr. Lillis, if a creek like Beaver Creek, with a meandering course, got out of its banks so it meandered through the country like described by

(Testimony of B. C. Lillis.)

the various witnesses here, what have you to say with reference to the velocity or speed of the water when it got outside of the banks, cutting across, as compared with the time it would take the water to go around by the various twists and turns in the stream?

A. The speed of the water, when it got out of the channel and started right down the valley, would be much greater; that is, it would cover a mile of the valley quicker than it would if going on the meanders of the stream.

Some reference was made to a cross section which was introduced by the plaintiff, but which had been prepared originally [522] by the defendant, and my attention was directed to some computation by which we could get to some figure. As to whether in making that computation, which counsel insisted on me making, I had in mind the effect of the building construction, will state that I didn't take out the area of the building construction. In order to get an accurate computation, it would be necessary to take out the area of the building construction. It would also be necessary to take out the area of that elevated walk to the east of the county bridge.

#### Recross Examination:

Defendant's exhibit D-11 is what I mean by the "corrected figures"; as I understand it, these are the figures.

Q. Those are the corrected figures?

(Testimony of B. C. Lillis.)

A. The figures that had been corrected and had been agreed upon by the two engineers, Mr. Oien and Mr. Lyman, as correct. Reading what you have indicated on this exhibit: "Elevation of nominal low water Beaver Creek at Massey's cow shed 2632.2." Now reading these lines and those figures you have indicated: "Elevation of high water June 7, 1929, about 200 feet west of Massey's house 2643.5."

Q. Will you take the difference between 2632.2 and 2643.5?

A. Yes; but those points are not the same.

Q. Just take that difference and we will hear your argument afterwards?

A. 11.3 feet.

#### Redirect Examination:

I wanted to make some comment on the exhibit. I will make the explanation I wanted to make: The elevation taken for low water in the creek is one place and the elevation taken for the high water in the creek is another place; there is a difference in the elevation of the stream.

#### Recross Examination:

I can scale it off and tell it better than guessing, as to how far apart they were. One point is up at the cow shed and [523] the other is straight west of the house; it is a matter of probably 300 feet. These are not my figures at all; these are Oien's figures. As to how much difference there was in



(Testimony of B. C. Lillis.)

the elevation of the water 200 feet west of Massey's house at high water and what it was opposite the cow barn, I wouldn't attempt to say,—I would simply know what it was where it was measured.

Q. Would it be an inch?

A. Yes, it might be a matter of several feet, because it hit the bank where it turned there and turned and shot out to the west and it undoubtedly would have a lot of fall. I didn't make use of Oien's cross section at Massey's. I made it down where the conditions were uniform and not where it was subject to rapid changes. As to whether I surveyed anything there where Oien had a survey, will say that I measured the distance from the water to the top of the cow shed there—just to check it with Oien; Oien wasn't there at the time. I found no difference in his figures.

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Mr. McCARTHY: If the Court please, during the course of the presentation of the plaintiff's case, we offered defendant's D-12, being a certified copy of the War Department report. I now offer defendant's D-12 in evidence.

The COURT: I can't see the materiality or competency of it. I will make the same ruling I did before.

Mr. McCARTHY: And the Court will grant us an exception, please?

## BERNARD BLUM,

called as a witness in behalf of the defendant,  
testified:

## Direct Examination:

(By Mr. McCarthy).

My name is Bernard Blum. I live in St. Paul. My profession is civil engineering. Am a graduate of the Massachusetts Institute of Technology,—in 1904,—commonly called “Boston Tech”. [524] Since graduation I taught school for a year; was employed by the Chicago Junction Railway as draftsman, rodman and assistant engineer; then entered the employ of the Northern Pacific in 1907, and have been with them in various positions,—roadmaster, assistant engineer, district engineer and engineer maintenance of way and, since 1928, chief engineer.

I was acquainted with the bridge over Beaver Creek at Wibaux prior to the flood of 1929. Since that flood, I have made some study and investigation of Beaver Creek valley. I have been here throughout the trial of this case and I have heard all the testimony. As to the study and investigation I made of the Beaver Creek Valley, I have traversed the valley upstream and partly downstream, and across several locations, and have looked over the townsite and, you might say, numerous studies have been made under my direction in connection with the preparation of this case and previous cases on trial. The studies made by Mr. Oien, Mr. Clements—all those men, are under my jurisdiction.

(Testimony of Bernard Blum.)

Based on the studies to which I have referred and the studies made under my supervision which I testified to in Court, taking into consideration further the exhibits received in evidence, I am able to form an opinion as to the adequacy or inadequacy of the bridge over Beaver Creek immediately prior to the flood of June 7, 1919, at Wibaux. In my opinion, the bridge, as constructed prior to 1929, was an adequate opening for carrying the waters of Beaver Creek and a logical bridge to construct for such a stream.

Cross Examination:

(By Mr. Maury).

I have been a witness before in a case at Baker involving some of the same questions here.

Q. At a trial last September or early October at Baker, were you asked this question: [525]

Mr. McCARTHY: I suggest you submit it to him.

The COURT: Let him read it and see what he has to say.

Q. Did you make that testimony? (indicating).

A. That is as I recall. It is substantially what I said.

Q. Then, you testified there: "Q. Mr. Blum, what is an adequate bridge? A. An adequate bridge is one that carries—permits the water to pass through freely." You made that answer?

A. Yes, sir.



(Testimony of Bernard Blum.)

“Q. What relation has an adequate bridge to the banks of the stream—I mean the first banks?” You answered: “It may or may not be the same as the width between the first banks of the stream.”

A. Correct.

Q. I asked: “How long was the first bridge that was put there?” You answered: “137 feet.”

A. Correct.

Q. You were asked: “Do you refresh your mind from the plat?” Answer: “I do not.”

A. That is correct,—referring to the profile.

Q. You were asked: “What does the plat indicate?” Answer: “This plat shows the bridge that was there just prior to the 1929 flood.”

A. That is correct.

Q. And question: “And how long was that bridge?” Answer: “This plat shows that that bridge was 114 feet I think—114 feet long.”

A. That is correct.

Q. That was your answer. “Question: Was that the measure of adequacy? Is that what should have been there—an opening of 114 feet?”

A. I think I was.

Q. And you answered: “From the evidence up to June, 1929, that was according to good engineering practice, was an adequate opening.”

A. The same thing I have just said now. That bridge was an adequate opening, yes, sir.

(Testimony of Bernard Blum.)

Redirect Examination:

I recall the bridge I think, that was in place at Wibaux over Beaver Creek, immediately prior to the flood of June 7, 1929. As I recall, he said that the 70-foot plate girder—the central [526] one—over all was 71 feet 9 inches long, and that bridge had two approach spans as I recall, he said, each 20 feet long, but that is measured center to center of bearing, and the entire bridge,—I don't recall whether he said how much it was—but I know that bridge was 114 feet long. When I was testifying at Baker, and as to the part of the testimony referred to by counsel a minute ago on cross-examination, when I spoke of a bridge 114 feet, I am referring to the bridge shown there prior to June 7, 1929, as shown by that model; that cannot be changed. I also referred to the profile which counsel for the plaintiff showed me, and I took that measurement direct from the profile, which shows 114 feet long.

Recross Examination:

Q. Did you take into consideration that in 1921, there had been a portion of the track washed away east of that bridge?

A. I couldn't take such a thing into consideration, because it wasn't washed away. Whether I took into consideration that that bridge had been injured by a previous flood, will say that bridge never had been injured by a previous flood—never to my knowledge. I can't answer that directly,

(Testimony of Bernard Blum.)

whether there had ever been any repairs on that. If you mean by that,—possibly some repairs to riprapping, which is frequently done,—but I don't recall any repairs to the bridge itself.

Q. Did you take into consideration a high-water mark on that bridge 7.3 feet below the top of the ties——

A. What is the answer

Q. And say that was an adequate bridge for all conditions that existed there before June 7, 1929?

A. I had previously, during the same period on the stand, said that in my opinion, that that was an incorrect record. My previous testimony, possibly half an hour before that statement, made that correction, yes, sir, I therefore, took that into consideration.

Q. Then you consider this record D-24 untruthful as to the words [527] or the letters "H. W. 1900—7.3"?

A. As I testified in the September-and-October trial, I had investigated that and am convinced that that record is stated erroneously.

Q. Then, if that record is stated erroneously, you had no permanent record of that bridge before you since 1893 had you? I mean permanent record of high-water marks.

A. We had 1893, 1897, as I recall, and of course, 1921. 1897 is right here (indicating on exhibit); that water mark in 1897 was 10 feet 8 inches below



(Testimony of Bernard Blum.)

the base of rail. This record clearly refutes your statement that "it was the custom to not place any water mark that was not so high as a previous mark." It has been done; it is done there.

Q. Did I understand Mr. Clements on the stand, to say that unless a water mark was higher than a previous water mark, that it is not placed on this permanent record?

A. Usually, it isn't. Mr. Clements testified correctly. You asked a direct question and I answered it from the record. This record so states that for this, there was a lower mark placed on here than the previous one for 1897.

Q. Then there really wasn't much of a rule or custom about that at all?

A. Yes; there has always been a rule or custom.

The high-water record of 1921 is shown here (referring to exhibits, photostatic copies). It is shown as 11 feet below base of rail. As to whether that was higher or lower than the 10-foot record, considering the difference in elevation,—you see, the bridge was raised in 1898. Therefore, the 1921 high-water record is a higher record than the 1897, yes, sir, therefore, it was shown on there in accordance with practice and custom.

As to whether a bridge which backs up water is adequate, will say that we have a number of openings that are adequate that back up water and discharge under a head. Generally speaking, a bridge of this type—I am talking now not about

(Testimony of Bernard Blum.)

this bridge, but some other—this is a hypothetical question—but a bridge of that type, [528] we would not design it to have water impinge against the sides of the girder,—if that is what your question means.

Q. If the bridge is so narrow that it extends water to the east of the bridge, on the side of Beaver Creek, is that an adequate bridge?

A. Ordinarily speaking, it is not; but it might be in some cases.

Q. And if this bridge is so narrow that in ordinary recurring high-water periods, it backed up water, formed a horseshoe and around the town, and ran down the swale, would that still be, in your mind, if that testimony is true, an adequate bridge?

Mr. McCARTHY: Objected to as not proper evidence.

The COURT: He is propounding the question, based on his own theory from evidence he has introduced. Overrule the objection.

A. I have heard no such testimony as that.

I may say that I didn't believe the testimony of Mr. White, that "the creek had a custom of water stopping at the bridge, that is in ordinary recurring high water, backing up under the county bridge, forming a horseshoe and going down the swale."

Q. If that testimony was true, then that bridge would not be adequate?

A. Well, I just say in general, if any bridge did such a thing as that, you might question the

(Testimony of Bernard Blum.)

adequacy of it. Whether such a bridge was adequate or was not adequate in my opinion, will say that I would have to know all the circumstances, but in general terms, to get through with this, if such a thing recurred, it would be questionable if it was adequate. \* Of course, if we make an assumption that certain things happen which may not have, we will have to come to a natural conclusion in keeping with such things. We might say that we may consider—any bridge may be considered inadequate under such conditions.

Q. If that bridge did back up water 1200 feet six or eight times and made a horseshoe around the town and water ran down the swale, [529] why that bridge was not adequate was it?

A. Possibly not; probably not.

Q. Mr. Blum, you made an examination of Wibaux soon after the 1921 flood?

A. I was there, yes, sir.

Q. And did you go there soon after the 1929 flood?

A. Not immediately, no.

Q. Do you know whether more of the town was covered by water in 1921 than in 1929?

A. More of the town covered in 1921? Will you show me what part of the town?

Q. Davis Addition; region of the swale; Mrs. Edighoffer's laundry; the region near the lumber yard; the water tower.

A. In 1921, to my knowledge, there was no water



(Testimony of Bernard Blum.)

over the streets or around the buildings of Wibaux proper. In 1929 the most of the town, it is so indicated, in the vicinity of Wibaux Street was badly flooded; that is there was considerable depth of water over it. Therefore, it is patent that the 1929 flood covered far more area of the town than could have occurred in 1921. In 1921 there was a severe storm to the southeast of Wibaux and the water came down what has been called Possum Hollow and, in running off, ran around a number of the houses apparently in the draw near the mouth of Possum Hollow, and came across the elevator tracks and washed out a portion of the same and then ran off peacefully into the creek without any further damage.

Q. How far did that storm extend east along the Northern Pacific Railway?

Mr. McCARTHY: Objected to as immaterial.

The COURT: I believe he said it extended for a great distance.

Q. I want to know what he means by "great distance."

A. In my answer I was referring to the water that came over the Davis Addition, and from my observation, going over that territory, it apparently ran back there I would say two miles or so,— [530] two or three miles—that water came down Possum Hollow. As to the area of the town—the town limits—I would say that in 1929, unquestionably, a much greater area of the town was covered with water

(Testimony of Bernard Blum.)

than there was in 1921; there is no question about that.

Redirect Examination:

Q. Counsel, on cross examination, asked you a hypothetical question here and asked you to assume the water backed up the creek some way and ran around and formed a circle—a horseshoe I think he called it. During your years as engineer, and including your various capacities, and as chief engineer and your study of the records, did you ever find such a condition?

A. No such condition ever occurred to my knowledge and experience, at Wibaux.

I don't believe I am qualified to answer whether the measurements were made at that bridge for a good many years by John Presthus. The measurements are sent in by the District Engineer and the Assistant Engineer. The section foreman may show to him marks, but it depends upon the Assistant Engineer to satisfy himself from the visual conditions. It is always clearly indicated where the water mark is. It is self-evident that the Assistant Engineer cannot be at four or five bridges at the same time. So he has to take the point on the record, pointed out by the section foreman in many instances, and the conditions on the ground which are clearly visible. I wouldn't say that he had to take his information in the first instance from the section foreman frequently; he confirms it.

SAMUEL MURRAY,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

My name is Samuel Murray and I live in Portland, Oregon. [531] I am a civil engineer. I was graduated from the University of California in 1902, specializing in civil engineering and specializing in bridge work. Prior to my graduation, I might say, and immediately subsequent thereto, I was laborer on bridge work, structural iron worker, and occupied various subordinate positions. I then went into the office as draftsman and in 1906 I was in charge of the office of the Consulting Engineer of the Harriman Lines; they were at that time the Southern Pacific and Union Pacific Systems. In 1907 I went to the Los Angeles & Salt Lake Railroad as Bridge Engineer; that is the line from Salt Lake City to Los Angeles, now part of the Union Pacific System. Early in 1909 I was detailed to Washington to act as Bridge Engineer on the extension of the Union Pacific in to Puget Sound and the Western Washington territory. In 1914 I moved to Portland as Bridge Engineer of the Oregon-Washington Railroad & Navigation Company, and in 1915 I became Chief Engineer for that company, which position I still hold. And since that time, I have been permitted to engage in outside practice in the course of which I have been identified with very large structures in the



(Testimony of Samuel Murray.)

Pacific Northwest, including the very high bridge at Twin Falls, Idaho, which I believe was the highest bridge in the world. I am not in any way at all connected with the Northern Pacific Railway. I was called upon by the Northern Pacific Railway Company to examine Beaver Creek Valley and make a study of the bridge,—the railway bridge that was in place at Wibaux prior to the flood of June 7, 1929, and I made some investigation in connection with preparing to testify here in this case. I examined the Beaver Creek watershed very carefully in 1931 I believe, and examined the stream and took into consideration all the factors that would determine the adequacy or lack of adequacy of the bridge as it existed prior to June, 1929; and I have heard the testimony introduced here in behalf of the defendant in this case or substantially [532] all of it. From the study which I have made and which I have detailed here, and from the evidence which I have heard in this case, assuming that evidence to be true, I am able to form an opinion as to the adequacy or inadequacy of the railroad bridge in question over Beaver Creek at Wibaux, and I have an opinion as to the adequacy or inadequacy of that bridge prior to the flood of June 7, 1929. From all the information available as to conditions which existed prior to June, 1929, I believe the bridge was quite adequate—would have been considered quite adequate. I reach my conclusions from the drainage area,—from its shape, slopes which are quite gentle, from the character of the soil and the general appearance of the terrain, and also

(Testimony of Samuel Murray.)

from the record of high waters which had occurred prior to June, 1929. I would consider the bridge entirely adequate from the point of view, what a reasonable man would construct there.

Reference has been made here during the trial of this case to the Myer formula, Talbot formula and kindred formulae. I have an opinion as to such formulae being accurate to determine the open area necessary for a bridge such as the railroad bridge over Beaver Creek at Wibaux. Such formulae are entirely useless for an area of any great extent and, in fact, I have very little confidence in them for any use whatever. I ceased using them after I had been in practice for a very few years; they are totally, or approximately unreliable.

Cross Examination:

(By Mr. Maury).

I didn't aid in the construction of the Salt Lake & San Pedro; I entered into its maintenance, however, and made repairs too. Bridges in that area for a great part, may have been constructed according to formulae, but they washed out, in floods which I have observed, which were as extraordinary and unprecedented almost, as this one. In regard to what an "unprecedented [533] flood" is,—of course, a flood in any drainage area might be without any precedent in that area, but I would say that it would be a flood so great and so large that

(Testimony of Samuel Murray.)

no reasonable man would expect that such a thing could occur.

Q. Surely. But if there was the same or a larger flood in 1907 than it was in June, 1929, then you would say the June, 1929, flood was not unprecedented?

A. Necessarily, yes.

Q. If there was in 1921 covered, a larger section of the town in Wibaux, than in 1929, then you would say the 1929 flood was not unprecedented, would you?

A. That would also follow, yes, sir.

I spoke of my having examined the drainage area, part of it. As to being treeless, that entered into my consideration. The slopes are not steep; the slopes are generally rather gentle.

I was at the trial of the case of Heckaman vs. Northern Pacific Railway Company, at Baker, in September and October, 1931. (Witness reading). I testified as bracketed there I think.

Q. And you were asked this question: "Mr. Murray, the best test, and perhaps the only good test on the sufficiency of a bridge over a particular stream is whether it carries the water that is seen to run in that stream year by year—isn't that the best test?" I asked you that question there, and you answered: "That is the best test under ordinary conditions, yes." You were asked this question: "In fact, when a bridge after being constructed is seen not to carry away floods that recur every two or



(Testimony of Samuel Murray.)

three years, there is something wrong with the bridge, isn't there?"

A. Yes.

Q. And you answered: "If the bridge interferes seriously with the regular flow of the stream, I think the bridge is inadequate."

A. All right. \* I answered that way.

Q. Do you wish to read any further?

A. No; but I would like to comment on that.

Q. Well, you can comment in the hands of counsel. I haven't quite finished. [534]

(That was on page 649 of the Heckaman trial), year 1931.

At a trial at Baker late last September and early October (witness reading) I was asked these questions and made these answers.

Q. You were asked by me: "You never had seen the bridge when it stood as a bridge by itself, but only as a part of another structure, is that so, Mr. Murray?" and your answer: "Well, I saw the bridge and examined the bridge after part of it had been raised." "Q. As a part of another structure?" "A. Yes, but of course, in forming that opinion, I was readily able to visualize the bridge as it had been." You made that answer?

Q. You were asked: "How long are the openings of the bridge that you have in mind?" You were asked that question and you answered: "There was a 70-foot center span and two 20-foot small girder approach spans," and you were asked: "And your conclusion was that a reasonable and adequate

(Testimony of Samuel Murray.)

bridge there at all times before June 7, 1929, should have had openings corresponding with what you have named?" and you answered: "Yes, there might have been some variation—slight variation, but it was in that vicinity."

A. Yes, sir.

When I was at Baker the first time, some blue prints were shown me of that bridge. I don't know where those plans are; I have not seen them since.

#### Redirect Examination:

Counsel called to my attention some testimony here in the Heckaman case (pages 649 and 650). I wanted to make some comment and he said I could do so. The question was: "In fact, when a bridge after being constructed is seen not to carry away floods that recur every two or three years, there is something wrong with the bridge, isn't there?" And I answered: "If the bridge interferes seriously with the regular flow of the stream, I think the bridge is inadequate." Now, the explanation I want to make [535] is this, that I have heard nothing to indicate that the bridge was seen not to carry away floods that occurred every two or three years. I have heard that the bridge failed to carry away the most extraordinary flood I had ever seen in an area of this nature and something I had not seen in my experience; and of course, it had occurred.

JOHN OIEN,

being recalled in behalf of the defendant, by Mr. McCarthy, testified:

Q. Mr. Oien, associate counsel thinks I over-looked asking for the ground elevations of the O'Keefe house and at the Yuell house; the ground floor elevations—have you them?

A. The floor of the Yuell house is 2642.7, and the floor of the O'Keefe house is 2640.3.

By Mr. Maury:

Q. Mr. Oien, I neglected to ask you the other day whether any of the land which is outside of the black line which you described was ever on a Northern Pacific Railway section; that was never a land-grant section was it?

A. I don't know. I think Wibaux is on section 12; I can't say what numbers are Northern Pacific land-grant sections.

Mr. HALL: That quarter section of land——

Mr. MAURY: This was purchased by the Northern Pacific and none of the Town of Wibaux was ever on a land-grant section?

Mr. HALL: No.

Mr. McCARTHY: I think the record will show that every adverse ruling so far as the defendant is concerned, was duly excepted to, but for safety's sake, may it be recorded in the record that the defendant is granted an exception to each and every adverse ruling in the case?

Mr. MAURY: Oh, I don't know—in Federal Court. [536]



(Testimony of John Oien.)

The COURT: I think an exception was taken in every instance.

Mr. MAURY: I think so.

Mr. McCARTHY: We formally offer in evidence the two bridge models and all parts thereof and the same as the relief map, and that they may be returned to the custody of the company.

Mr. MAURY: We don't agree that they depart from the custody of the Clerk here, unless they go to the Clerk of the Supreme Court of Montana or to the Clerk of the Circuit Court of Appeals, or to the Clerk at Baker (Montana).

The COURT: I think they should be perhaps, kept in the custody of the Court.

Mr. McCARTHY: All right, may some of our people pack them up? The security of them, that is what I am interested in. Will you read the deposition of W. L. Darling, please, Mr. Jameson? The stipulation covering it need not be read in this case, I take it?

Mr. MAURY: Oh, no.

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Deposition of

WILLIAM L. DARLING:

BE IT REMEMBERED, that, pursuant to the stipulation hereunto annexed, and on the 28th day of December, 1933, at my office in the Northern Pacific Railway Company Building at 176 East

(Deposition of William L. Darling.)

Fifth Street, St. Paul, Minnesota, before me, G. T. C. Peterson, a Notary Public in and for the County of Ramsey, State of Minnesota, duly appointed and commissioned to administer oaths, etc., personally appeared W. L. Darling, a witness produced on behalf of the defendant in the above-entitled actions, now pending in said Court (Nos. 2444, 2446, 2493, 2494, 2497 and 2517, in the District Court, Fallon County, Montana), who, being first, by me, duly sworn, was then and there examined upon the following written interrogatories, submitted on behalf of counsel for said defendant, and upon the following cross-interrogatories submitted on behalf of counsel for said plaintiff, and testifying in answer [537] to said interrogatories, as follows:

Direct interrogatories propounded by counsel for defendant, to-wit:

1. State your name, occupation and place of residence.

A. William L. Darling, St. Paul, Minn.

2. Of what engineering school are you a graduate?

A. Worcester Polytechnic Institute. B. S. 1877.

3. Were you formerly in the employ of the Northern Pacific Railway and other railroads? If so, state fully when, and in what capacities, as an employee and officer.

A. Yes, started with the Nor. Pac. in March 1879, then one month cross sectioning along Sweet Briar Creek; then Resident Engineer in charge of

(Deposition of William L. Darling.)

construction from New Salem to Curlew to October 1st, 1879; then Resident Engineer from Belfield to one mile west of Sully Springs to October 10th, 1880; then revising line and cross sectioning bluffs along the Yellowstone from Cabin Creek to Miles City to April 20th; then west overland to Bozeman and helped run line over Pipestone Pass to Garrison as transitman which we reached about Aug. 1st 1881; then revised line as Chief of Party down the Hell Gate River to Clinton until Oct. 7th 1881; run preliminary line down the Missoula River to a point near Thompson Falls; then made a reconnaissance up Nine Mile Creek to the summit of divide between the Missoula and Flathead Rivers which ended Dec. 1st, 1881; then became Resident Engineer of Construction from the present town of Garrison, Montana, to Clinton where I stayed until the completion of the work in August, 1883.

Commencing Sept. 1st, 1883, I had charge of the Minneapolis Terminals, including bridge over the Mississippi River, and the construction of line St. Paul to Watab which work ended in February, 1884.

March, 1884, to December, 1885, I was Chief Engineer in charge of location and construction of St. Andrews Bay and [538] Chipley RR. 1885 to 1887 in charge of terminal construction in Minneapolis and St. Paul for the C. B. & Q. RR. 1887 Chief Engineer of the Duluth, Watertown & Pacific RR. now part of the Great Northern system. 1887



(Deposition of William L. Darling.)

to 1888 located line built by the Great Northern, Sioux Falls to Yankton, So. Dak. 1888 Engineer in charge of washout repairs, Minot to Great Falls on Great Northern Ry.

My next connection with the Northern Pacific was in the fall of 1888 when I had charge of the construction of the bridge over the Yellowstone on the Rocky Ford or Red Lodge Branch where I stayed about a month, then took charge of the location and construction of the main line from Little Falls to Staples; then in the same winter had charge of the Boulder to Elkhorn Branch; then in charge as Resident Engineer of the location and construction of the line over the Bitter Roots from the summit down the east side for 10 miles, it afterward being extended to St. Regis, Mont. About the middle of February I was appointed Prin. Asst. Engineer of the road from Spokane to Billings in charge of all engineering and construction, where I remained until transferred to St. Paul as Prin. Asst. Engineer from Billings to St. Paul, occupying this position until April 1896, when I was made Chief Engineer for the Receivers until Aug. 1, 1896, then became Division Engineer under E. H. McHenry; then in 1901 was made Chief Engineer where I remained until August 15th 1903 when I resigned to accept service elsewhere.

I was Chief Engineer of the Chicago, Rock Island & Pacific RR. from August 15, 1903 to October 1st, 1905, and Chief Engineer of the Pacific

(Deposition of William L. Darling.)

Railroad (now the Chicago, Milwaukee, St. Paul & Pacific Railroad) from October 1st, 1905 to December 18th, 1905 when I returned to the Northern Pacific as Chief Engineer where I remained until 1916 when I resigned. My service included about 31 years. Following my resignation in 1916 I entered, and still continue, consulting practice with headquarters in St. Paul. [539] During this period I have acted as Associate Member of the Naval Consulting Board during the World War; appointed a member of the Advisory Commission by the Secretary of State of the United States in 1917 and went overseas to Russia to study rehabilitation of the Russian Railway System; member of the Board of Economics and Engineering for the owners of railroad securities in New York 1921-1922; member of the City Planning Board and City Zoning Board, St. Paul. I am also a member of the American Railway Engineering Association and the American Society of Civil Engineers and have acted as President, Northwest Section, of the American Society of Civil Engineers.

4. Are you familiar with the country traversed by the Northern Pacific Railway in western North Dakota and eastern Montana?

A. Yes.

5. Do you recall the bridge carrying the main track of the Railway Company over Beaver Creek at Wibaux, Montana, that was constructed in 1896?

A. Yes.

(Deposition of William L. Darling.)

6. Describe the bridge as built in 1896?

A. The bridge consisted of a 70-foot central span and a 20-foot approach span on either end over the slopes.

7. Did you approve the plans for the bridge built in 1896?

A. Yes.

8. Was it your intention that the space between the abutments and the piers be left open as waterways, or that the spaces should be filled or partially filled?

A. Partially filled.

9. Was that a usual or unusual manner of constructing bridges over streams?

A. It was and is a type in general use.

10. Is it customary or not customary to riprap or face the slopes of earth embankments contiguous to and for some distance [540] back from the ends of bridges over streams?

A. Yes, it is customary.

11. Was the bridge over Beaver Creek raised several feet in 1898?

A. Yes, in connection with the grade revision of Beaver Hill.

12. What purpose does riprap rock serve, if any, in addition to protecting the earth works from washing away?

A. Increases waterway by decreasing slope of embankment.

13. Can you form an opinion as to whether or



(Deposition of William L. Darling.)

not the bridge, consisting of a 70-foot span over the creek and two 20 foot approach or slope spans, provided a proper and adequate opening for Beaver Creek?

A. Yes.

14. What is your opinion?

A. It was adequate.

15. Give your reasons for your answer to Question No. 14.

A. The waterway was designed from known high water. No higher water ever occurred while I was with the road, and further from the fact it did take the full flow until 1929, a period of 33 years, and then failed only during a period of precipitation that could not have been foreseen. Furthermore it covers a period from 1882 to 1929 of known high water, or 47 years.

16. In your opinion, did the bridge as constructed with the space between the abutments and the piers partially filled, as described by you, result in the restoration of the Beaver Creek stream or water course to its former state of usefulness as near as may be?

Mr. MAURY. We object as calling for an opinion not within the capabilities of a mining engineer; calling for an opinion as to law of Montana and invading the province of the Court and Jury. We add to the objection that the witness is [541] not shown at all to be familiar with its former state of usefulness.

(Deposition of William L. Darling.)

The COURT: I think he has shown himself to be qualified to state his opinion. I will overrule the objection

A. Yes.

(Signed) W. L. DARLING.

Cross Interrogatories.

1. When did you first commence to work for the railway company?

A. March 28, 1879.

2. Are you still in the employ of the railway company?

A. No.

3. Do you draw a pension from the railway company?

A. No.

4. If you answer that you did approve the plans for the bridge built in 1896, question number 7 in the direct interrogatories, then tell at great length and completely what measurements of the watershed, if any, that you consulted or used.

A. The water way for Beaver Creek was determined by me from known records of high water and personal knowledge of myself supplemented from information furnished me by the Bridge Supervisor of that district. These high water marks were obtained by observation during high water stages and were determined and made by the Supervisor of Bridges and Buildings of the district. They were taken into consideration by me. Water way for Beaver Creek was determined on the ground

(Deposition of William L. Darling.)

by myself after an extended investigation in company with the Bridge Supervisor.

5. Tell of and give copies of the records of high water marks made either by the Northern Pacific Railway Company as to the water flowing under this bridge or from the records of the Northern Pacific Railway Company, or records made by the Northern Pacific Railroad Company. [542]

A. The highest known water in Beaver Creek at Wibaux up to 1896 was the high water of 1893 with elevation of 2626.3 at the railway bridge. To my knowledge the 1893 high water was the highest water in Beaver Creek at Wibaux during my service with the NP Railway Company, 1879 to 1916.

6. State whether you intended that the bridge have a width as to its opening for water of seventy feet long or one hundred fourteen feet long.

A. The 70 ft. girder was designed to span the creek proper, the 22 ft. end girders were provided to span the embankment slopes and also provide additional opening during high stages of water.

7. State how often you have visited Wibaux in a professional capacity.

A. Approximately 20 trips.

8. Give the dates of such visits and consult any records that are available to you in the possession of the railway company or otherwise, showing such dates, and as near as you can, the length of time



(Deposition of William L. Darling.)

that you stayed professionally at Wibaux and working for the railway company.

A. Impossible to give exact dates, but between 1893 and 1900 made annually two inspections of this bridge, one in the spring and one in the fall. The time for these inspections was probably from 15 minutes to one half hour. In 1898 made several trips to Wibaux during period of grade revisions where I would spend sometimes one hour and sometimes half a day.

9. Did you have before you, when you were passing professionally upon the sufficiency of the bridge at Wibaux, that was erected in 1896, any original survey or plat of the original survey of the Northern Pacific Railway Company, or its predecessor, showing the elevation of its track as originally laid from Medora to Glendive? [543]

A. Yes, these records were always available and were at the time referred to in 1896.

10. If you answer that you did have access to such a plat or survey, was this plat and survey in manifold copies or duplicate originals for use of the engineers of the railway in 1896?

A. Original tracings were not in duplicate but blueprints were available for field use.

11. Are such duplicate originals, or any of them, in existence today and open to your inspection, or in your possession. If so, please attach a copy of the same or one duplicate original to this deposition, having the Notary Public mark it Exhibit 1.

(Deposition of William L. Darling.)

A. I do not have in my possession the NP records. NP Railway Company have records on file in St. Paul which were opened to me for my inspection.

12. When did you first see the Beaver Creek Valley as it intersects the present line of the Northern Pacific Railway Company?

A. In the early part of October, 1880.

13. Is it not a fact that according to the plats and surveys made by the Northern Pacific Railroad Company, which is the predecessor in interest of the Northern Pacific Railway Company, that the banks of the stream where the railroad now crosses Beaver Creek were more than five hundred feet in the width, that is to say, from East bank to West bank was more than five hundred feet?

A. No, it is not a fact. There is a bench on the center line of railway approximately 500 ft. west of present bridge: Elevation of foot or lowest part of this bench being two or more feet above any known high water previous to 1896. This bench, together with general topography of valley immediately adjacent considered in connection with the N. P. records, clearly indicates that the main channel has changed from time to time and in a [544] definite easterly direction. N. P. records further show present main channel to be about 60 ft. easterly of the main channel of 1880. N. P. records further show the banks of the Beaver Creek to be no greater distance apart than 80 ft. Consequently

(Deposition of William L. Darling.)

at no time could the bench of land above referred to have been the westerly bank of present Beaver Creek.

(Signed) W. L. DARLING.

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Mr. McCARTHY: If the Court please, I think on cross-examination of Mr. Clements, counsel had him—yes, I see the timber abutments are still in the exhibit, but we want it raised up to the position at the time of the flood. I suggest that Mr. Clements do it after the adjournment there, and if counsel for the plaintiff wishes to, he may be present.

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T. J. BUSHELL,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. Jameson).

My name is T. J. Bushell. I live at Wibaux; have lived there since April, 1907. When I went there in April, 1907, I located right in the town of Wibaux. We bought a ranch 25 miles south of Wibaux, but we didn't move out onto it. That ranch south of Wibaux is on Beaver Creek,—the Davis Ranch. I heard some testimony relative to a severe storm of 1907; that ranch of mine was in the path of that storm. I was there at the time. Relating briefly the



(Testimony of T. J. Bushell.)

nature of that storm in 1907: with my partners, we drove down from Wibaux in the forenoon and got out to the ranch between 11:00 and 12:00 o'clock. We hadn't been in there very long when a cowboy rode in and told us to get the stock off the low land,—that there was a storm. We looked over and saw the storm coming across the valley and in a few minutes, we was on [545] the roof,—five or six of us,—and we stayed there until dark that night. The next day after the storm we drove over the land we had bought; my partners hadn't seen the land. We looked it over, and the second day after the flood we drove back to Wibaux. We were driving team and wagon. At no place is the road more than half a mile away from the course of the creek down to Wibaux; it follows it a good distance. We forded it; there were no bridges in what is Wibaux County at that time. As to the extent to which the creek banks may have overflowed, what I noticed on my way back to Wibaux—will say that there was 12 or 14 miles that it had been pretty well out of the banks; five miles north of the ranch had been the worst place. There was a lot of stuff there that had washed away from the ranch proper. As I say, the creek had overflowed its banks 12 or 13 miles from my ranch; that would be 12 or 13 miles from Wibaux. From that distance in—12 or 13 miles, on up to Wibaux—you could see that it had gotten out of the banks some, but most of the distance it had not gotten out of the banks. As to the situation at Wi-

(Testimony of T. J. Bushell.)

baux, it had raised very little in the town of Wibaux. I talked to the people at the hotel——

Mr. MAURY: We object to anything that was said.

A. Well, we forded the river a mile and a half from Wibaux without any trouble. There was no evidence that the creek had been out of its banks at that point, and there wasn't any evidence that the creek had been out of its banks between that point and the town of Wibaux, and there was no evidence that the creek had been out of its banks in the town of Wibaux.

I was in Wibaux in 1921. I heard the testimony as to the 1921 flood. Describing briefly the extent of the storm and any high water in Wibaux in 1921,—the 1921 flood came mostly from the east and south-east. On the east side of the Davis Addition there was quite a lot of water; that is what has been described [546] as Possum Hollow (you are pointing to it); there was quite a lot of water over on that side clear down to the industrial track of the railroad, and some parts of that were washed out. By "industrial track" I mean where the elevators are. As to the extent of the water in the town of Wibaux, well there was a small stream ran to the west along the right-of-way and turned at the lumber yard and went down under the viaduct. There was no water at all on Main Street or Wibaux Street. As to whether there was any water at all in that part of town west of Wibaux or Main Street,

(Testimony of T. J. Bushell.)

there was only this little stream that ran down along to the viaduct—that little stream that ran down along the railroad track and to the viaduct. As to whether the water in 1921 was confined to this district in the eastern part of town, that is the Davis Addition and the vicinity of the elevators,—will say that the creek raised; part of it ran from Possum Hollow and part of it followed the east side of the Davis Addition; there was quite a raise in town, but not much raise south of town. I wasn't in Wibaux in 1929.

Cross Examination:

(By Mr. Colton).

During the 1907 flood I was at the Davis place 26 miles south of Wibaux. It is a fact that I and some of the neighbors had to go up on top of the roof to get out of that flood. The water was just over the bar of the window—that would be the middle of the sash. That was Davis' house. In regard to damage to Davis' property during that flood, the wool was washed away. Part of that wool was found at about Edgehill at the Sheep Hook ranch. That flood continued south of Wibaux as far as Baker. I don't know about any damage done to the Milwaukee Railroad buildings west of Baker, during that flood of 1907.

Q. Between Baker and Plevna, isn't it a fact that the Milwaukee Railroad buildings all through there—— [547]

Mr. JAMESON: We object as immaterial in



(Testimony of T. J. Bushell.)

this case; the town of Baker isn't in the Beaver Creek valley.

Mr. HALL: We object to this,—that Baker is 30 miles south of the divide between the head of Beaver Creek, and it is a stream that flows the other way; and it is immaterial in this case.

The COURT: I think you are too far away. I will sustain the objection.

This water that made that flood that I saw down at the Davis Ranch in 1907, the bulk of that rain fell at the Davis—or between the Davis Ranch and what is known as the Big Hill. The Big Hill is at the divide about eight or nine miles south of where I was—ten miles maybe.

Q. That storm fell on the Big Hill and as I understand it, part of it came into the Beaver Creek Valley; and where did the rest of it go?

A. The rest of it went south; went south towards Baker.—towards Marmarth. At the place where I was 25 miles south of Wibaux, the width of that storm was about half a mile. As to its depth there; there was a picket fence around the house and it was near to the top of the picket fence.

Q. Did you see any ear-marks of the 1929 flood?

A. I wasn't there. That house has been pulled down for 15 years I guess.

Q. Did you notice whether any damage was done to property in that vicinity in the 1907 flood? Just tell the Court and Jury what damages was perpetrated to buildings, fences or anything else that

(Testimony of T. J. Bushell.)

was damaged in the 1907 flood, in the south end of the Beaver Creek?

A. There was no homesteaders in there; there was eight miles south of there; there was six miles north of there, and one two and a half west, was all the buildings I know of in that country; and there were very few fences there,—some was washed out—fences.

During the 1921 flood I mean to say there wasn't any water [548] west of Wibaux Street. As to whether it is a fact that in the location of the swale it was all covered here, will say that I took my car out of the garage at 4:00 o'clock; the garage was down on the right-of-way; I took it west of Wibaux Street and I put it in Hazlewood's garage—(that is the place that you are pointing to). The Dan Sutherland barn isn't on that plat.

Q. Where would that be located, if it were on here? (pointing). That would be about 75 feet west of E Sstreet and south of First Avenue South? Isn't it a fact there were three or four foot of water in that barn during the flood of 1921?

A. I never heard of it until now.

Q. So you say there wasn't any water at all over in this end of the town in 1921?

A. On the flats. I never heard there was any water west of Wibaux Street. There was no water that came along the swale and along the south line of the railway embankment and went to the viaduct—going east going to the viaduct; the water

(Testimony of T. J. Bushell.)

that went through the viaduct came from the east. There was no water when I took my car out.

I was employed by the Northern Pacific Railway Company some years ago. I was in the real estate department; worked for them about five years.

Redirect Examination:

My occupation now is real estate dealer and insurance. I am not employed by the Northern Pacific Railway at this time. I have been Mayor of the Town of Wibaux, and on the council; and I was on the Dawson County high school board when we were in Dawson County.

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(Mrs.) ELLEN GRAHAM,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. Hall).

My name is Ellen Graham. I live in Missoula, Montana. [549] I have lived at what is now known as the town of Wibaux; I came to that locality in 1884. I guess it is the Main Street where I located when I came there. It was not known as the town of Wibaux then; it was Mingusville. As to pointing out, I don't know whether I could do anything with that (on that relief map) or not. My building was south of the Pierre Wibaux property; my place of business was the Graham Hotel. When I came



(Testimony of (Mrs.) Ellen Graham.)

there, Mr. Wibaux occupied his residence in the building immediately north of me. Mr. Wibaux erected a retaining wall, or stone wall in the rear of his lot; he built that while he lived there. My attention having been called to this little white line on the relief map at the east end of the Wibaux property, I recall that that was the location of where that wall was, down to the creek. I don't recall whether the channel of the stream ran closer to the wall than it does now; I don't know. I lived there to 1906.

Q. How close was your building to the west bank of Beaver Creek? How close did the east end of your hotel come to the west bank of the creek?

A. They come to the lots. The bank of the stream was not quite a full lot to the rear end of the building; it wasn't quite to the end of the block; the block wasn't all there.

Q. State whether or not during the time you lived there—from 1884 to 1906—whether water ever got up into your building in any way?

A. Yes, sir. I don't recall that water ever got high enough to overflow this stone wall that Pierre Wibaux put in there, and I don't recall that I ever saw water high enough to be on Wibaux Street in front of my place.

OSWALD JOBE,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. Hall).

My name is Oswald Jobe. I now live at Rugby, North [550] Dakota. I have lived in Wibaux; was living in Wibaux on June 7, 1929. I was working at Hazlewood's garage. That is the long building with the round roof west of the Milton Hotel, facing on Orgain Avenue.

On the morning of June 7, I recall having seen some high water there. It was between 6:00 and 6:30 that I opened up my garage. I got up on that morning, to open up my garage, between 6:00 and 6:30. I was rooming at that hotel right next—that is the Milton Hotel right next to the garage. When I came out of the hotel that morning to open my garage, as to what I noticed in the way of water, and where,—will say I got up and went out and I walked down towards my garage, where I was working, and I was going to open up, and I noticed some water running down on the other side of the highway that runs north and south, and there was some water running around there.

Q. Coming in where?

A. Right here (indicating).

Q. Coming in there?

A. Yes.

Q. What were you going to do then?

(Testimony of Oswald Jobe.)

A. I was going to open my door; I didn't pay much attention. But I couldn't get it open, and I couldn't get it open because the rain expanded it, and I let it go until the other man,—Then I went back up the street towards the pool hall; that is the pool hall on the corner there just east of the Milton Hotel. I looked down towards the depot and I see some water running there and I was going to watch it.

Q. Where did that water run?

A. Right there (pointing).

Q. Between the lumber yard and the depot?

A. Yes. And I walked over towards the depot. There was no water at that time on Wibaux Street or Orgain Avenue. As I walked over Wibaux Street towards the depot and lumber yard, I looked south down Wibaux Street. I saw big waves of water going down towards the river. I know what is called the Mattie Miller house, or green house; I know where she lived,—in the big green house. It was in the vicinity of [551] that that I could see the water.

Q. What did you do when you walked over towards the lumber yard?

A. I went back up towards the pool hall and I went into the pool hall and I was going back towards the closet, and there was some fellows in there and they started to talk, (that is the building you are pointing to); I was standing listening to them fellows talk; at that time, I didn't know who they were; at that time, there was a roaring noise



(Testimony of Oswald Jobe.)

going in the basement. Some of the fellows says: "There must be some water coming in here," and I looked out of the window about that time and there was water running down Wibaux Street——

Q. Was it running north or——

A. It was going south.

Q. North?

A. Oh, north.

Q. Which way was it going?

A. Going towards the railroad track. Then we stayed around a while; then finally, the water came up to the floor; we stood around a little longer, and the water kept coming up a little higher and a little higher, and one of the men decided we better get out of there, and he couldn't get the door open and he kicked it out and when we went out, we was above our knees in water. That water was on the Main Street when we come out,—where the Pickering building is on the corner. That water was on Main Street; it was going north. Then I started back with the rest of the men, down from the corner; we went down here and we stepped into an alley; we turned from the Pickering building and went west on Orgain Avenue,—there was kind of a shed there, and we stepped in there. We stayed there a few minutes, then the water started getting higher, then we started out of that; we went out the front onto Orgain Avenue, then we started for the Milton Hotel. At the time I got to the Milton Hotel, the water was on me up to my breast. That water,

(Testimony of Oswald Jobe.)

as I was walking towards the Milton Hotel, was coming around the garage towards us.

Q. Coming around your garage or around the Milton Hotel? [552]

A. It was coming swiftly around here and around here (pointing). It was coming around west of the Hazlewood garage and down Orgain Avenue, and also coming into the garage from the Milton Hotel, from the south, and then turning down towards the north.

I went into the Milton Hotel. The furniture was floating around, then I went upstairs and things were crushing around and people says: "We will have to see about getting out of here." I couldn't get down; there was too much water. We stepped up that step-ladder up the stair where the roof was. When I went up there, I could see the water flowing; I could see the water flowing pretty swiftly. I could see from there the direction it was flowing on Wibaux Street; it was flowing north. I should judge its speed was about as fast as I could walk.

Q. As it got down towards the viaduct where did it go? As it went on north there, where did it go to, could you tell?

A. Well, it went north. I saw the viaduct. I couldn't say exactly how long I stayed up on the Milton Hotel before I could get down; it was several hours that I had been upstairs there on that roof.

(Testimony of Oswald Jobe.)

Cross Examination:

(By Mr. Maury).

When the water had gone away, I didn't notice a deep hole there (where you are pointing) below the viaduct; it was going so fast with water I couldn't say.

Q. I mean after it had gone.

A. After it had gone, yes there was a hole there.

Q. Do you remember when it was pumped out by the town of Wibaux and you saw it was about 20 or 30 feet deep right at the north end of the viaduct?

A. I couldn't say.

Q. What was the deepest you ever saw it?

A. I don't recall that I ever seen a hole there before the flood; I never had seen it before. After that flood I saw it—there was there in the center. I couldn't say how wide that hole was across the street. I could [553] not say approximately, after the flood, I was glad the water went down; I was glad I was safe; I couldn't say whether that hole was as wide as across the street. I couldn't say how long that hole was there, going lengthwise of the street; I wouldn't say, because—I didn't see any men working in it afterwards, filling it up; I didn't see them repairing a sewer in that hole.



## ARTHUR KIMBALL,

being first duly sworn as a witness in behalf of the defendant, testified:

## Direct Examination:

(By Mr. McCarthy).

My name is Arthur Kimball. I live in Missoula; am employed by the Northern Pacific; I have worked for the Northern Pacific Railway Company 22 years. I was working for the company in June, 1929; was roadmaster at that time. My present position is roadmaster.

In 1929, with particular reference to June 7th, I was at Wibaux. It was around 6:00 or 6:30 on the day of the 7th that I got down to Wibaux,—close to that time. I stayed in the town of Wibaux or vicinity during that morning; I stayed there from that time until about 2:00 o'clock. I was on the railroad embankment all that time. I saw something in the way of an unusual phenomena, so far as water is concerned, there that morning or that day. Along about—I don't know as I can give you the time—it was between 9:00 or 9:30, I looked off to the north and there was a wall of water coming at least five or six feet high—I looked south, off this way (pointing).

Q. Could you give us what direction it was coming from Mr. Kimball.

A. It was coming down Wibaux Street and to the main channel and to the west and coming towards the railroad once probably. When I seen it

(Testimony of Arthur Kimball.)

first, it was back by the lumber yard or possibly back up by Orgain Street, they call it. As to where that wall of water [554] went: it came down and went through the viaduct and bridge.

Cross Examination:

(By Mr. Colton).

Q. Mr. Kimball, just describe to the Court and Jury what you observed at Wibaux from the time you got there on the work train at 6:00 or 6:30 until the time you saw this wall of water. \* Describe the motions of the water and all about it. Give us an idea.

A. Well, when I first arrived at Wibaux, there was probably two or three feet of water going through the viaduct. The majority of that water was coming back by the lumber yard, back by the depot. There possibly was some of it coming from somewhere else; there was a small stream from up by the Catholic Church. I don't know how long that water continued to come that way—from about 8:30, somewhere in there; and “she” apparently dropped—the water did, and at that time was when we got this wall of water. But up until 8:30 there was a steady raise of water.

Q. And you didn't see any wall of water until 9:00 or 9:30?

A. I didn't pay any attention to the time. But at the time this wall of water came, there was not three or four feet of water on Main Street—there had been some water on Main Street, possibly two

(Testimony of Arthur Kimball.)

feet. The viaduct was not full. At that time, as to what was the condition of the railroad bridge—up until 8:30—the water at the railroad bridge, will say it was pretty close to the top of the girders,—or bottom of the girder, I mean. When this wall of water came, I was west of the viaduct, standing right over there (where you are pointing), right close to the end of the viaduct. I could see down Wibaux Street and off towards the county bridge, off in there.

Q. But you couldn't see as far as the bridge for the buildings, could you?

A. Yes, I could see there in that direction.

Q. Isn't it a fact you had to watch over in here (pointing)?

A. No, I didn't; I didn't have to. I could see right by the [555] lumber yard; you could see up Wibaux Street.

Q. The only thing you could see was the width of Wibaux Street?

A. You could see to the west—I mean to the east.

Q. As you looked down Wibaux Street and down to the Mattie Miller place, how much can you see? You can see a space equal to the width only of Wibaux Street clear to the south, isn't that correct?

A. You can see the width, yes.

Q. How much can you see, looking from the viaduct east?

A. Oh, you can see clear to the highway, way up above there.



(Testimony of Arthur Kimball.)

Q. You can see there, but you can't see south of the highway?

A. The highway south of the county bridge?

Q. Yes.

A. You couldn't see it then, because it was covered with water. I don't know whether it is a fact that the railroad bank has been raised five feet; I haven't been there since. It is possibly a fact that standing west of the viaduct, you can't see anything but right back by the lumber yard; possibly that is a fact.

Q. You saw this water come right down here between the county road and the railroad embankment?

A. I certainly did; I seen it between the county road and the railroad embankment.

Q. That is where you saw this six feet of water coming, between the county road and the railroad embankment?

A. Yes.

Q. You couldn't see it—these buildings—you couldn't see it south of the county road?

A. I could see it.

The COURT: Have it your own way, if you want to. The witness has testified what he saw.

As to where I saw this wall of water, I told you I was standing on the west of the viaduct and when I looked off towards the county bridge was where I seen the wall of water, and up Wibaux Street. I didn't see the wall of water at the same

(Testimony of Arthur Kimball.)

time at both places; I would have to look one direction and then the other. The wall of water was coming from the south. I wouldn't say it [556] was going straight north up Main Street.

Q. It was coming this way?

A. No, not that way; it was coming practically from south; south is off about this direction, compass south, but railroad-south would be straight up Wibaux Street.

How I happened to stop my train at Wibaux was because I was afraid to cross the viaduct.

Q. Didn't you have orders at 1:25 the night before at Glendive, to proceed to Wibaux?

A. I had orders at Glendive to proceed to Hodges; I had no notice of high water at Wibaux until I got to Hodges at 4:00 o'clock in the morning or sometime along there.

Q. In the former case of Heckaman vs. the Northern Pacific, I will ask you to read this and see if it is correct. Read it to yourself. (Transcript on Appeal, M. C. Heckaman vs. Northern Pacific Ry. Co., Vol. I, page 548). If that is correct, you read that aloud to the jury, starting in here (indicating).

A. Well, it is correct.

Q. Read it to the jury.

"I was roadmaster on June 7th 1929. On the night of June 6th I was in Billings until 7:10; I left Billings at 7:10 that night on No. 2. I arrived at Glendive about 1:35. When I got to Glendive I

(Testimony of Arthur Kimball.)

was instructed to go out with a work train, then being made up, to go east and repair some wash-outs at Hodges and then proceed to 'Beaver' where there was some high water. Hodges is about 12 miles west of Wibaux; we got to Hodges before we got to Wibaux."

That statement is wrong; I never said that before.

Q. You say you never said that?

A. I might have said "Beaver", but I got word of the high water at Wibaux when I got to Hodges.

Q. Did you make this statement, or did you not,—in the case of Heckaman vs. the Northern Pacific Railway Company?

A. Maybe I did, but I never remember it.

Mr. McCARTHY: There is no question about the record.

A. Well, I said it. [557]

Redirect Examination:

Q. Mr. Kimball, if you referred to "Beaver" in your testimony at the previous trial, did you have any information as to high water in Beaver Creek before you got to Hodges?

A. Not before I got to Hodges, I never received any information about any high water at Beaver Creek.

Q. You did, when you got to Hodges, you were told there was high water at Beaver Creek?

A. Yes, I was called into the telegraph office at Hodges by the Chief Dispatcher and he told me to



(Testimony of Arthur Kimball.)

look out for high water at Wibaux; it was about 4:00 o'clock.

Recross Examination:

Q. Is there any Beaver Creek at Hodges? When you said you were proceeding to the "Beaver" at Hodges, where would you naturally proceed? Beaver Creek, wouldn't you?

A. Yes. The word I received at Hodges was just what I told you—to "look out for high water at Wibaux." That was around 4:00 o'clock. The Chief Dispatcher sent that word from Glendive.

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CHARLES M. WOODARD,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. Hall)

My name is Charles M. Woodard. At the present time I live in St. Cloud, Minnesota. I was living 1909 to 1923, on my farm one mile north and four miles west of Wibaux. In addition to my farming, in the fall of 1909 I was manager of what we called the "North Side Elevator" in Wibaux; that has been torn down since. As to where that elevator was located with reference to the Northern Pacific main-line track, it was north of the track near the stockyards—near the stockyards, but north of the track. I had been managing that elevator—I was

(Testimony of Charles M. Woodard.)

there until the 1st of December, 1909,—all that summer. I was transferred to the [558] new elevator that they just had built on the spur there. During the time I was managing that elevator north of the track, I was living down town on Main Street. The county bridge wasn't constructed at that time. Going to and from my place of work I usually went down on the railroad track, that is I crossed over the railroad bridge here at Beaver Creek. In going back and forth I observed a concrete dam across Beaver Creek, immediately north of the bridge over Beaver Creek. My attention being called to the broken white line on either side here, and the depth on the relief map, that would indicate about where that dam went across. I said I observed that dam frequently as I went back and forth. I would say the dam, proper, across the creek would be 90 to 100 feet wide. In regard to the channel of the stream as it passed under the bridge, that channel of the stream as compared with the bridge at that time, was about the same width I think. Describing that dam: it was a concrete dam directly across the stream, four or five feet high, with wings at either end going back to the embankment of the railroad. I would say that the width of the channel of the stream, proper, was not as wide as the extreme end of those wings. While I was there working at the elevator, and after I had moved to the elevator, south, when there would be heavy rains in that locality and on

(Testimony of Charles M. Woodard.)

the east side of the town, I have noticed what effect the water had on the elevator track; it would run down from what they call Possum Hollow; it would run down against the elevator. I had charge of that elevator after I went to the south side, until the 1st of March, 1910. Then, from that time on, until 1918, I was farming.

In 1918, I worked for the State of Montana—the State Hail Department. My duties were adjusting the loss that occurred from hail; that was the State Hail Insurance. I started in in 1918, with Wibaux County; later on, I had Fallon County, Dawson County and Prairie County. In adjusting losses for hail, at the time, I [559] had occasion to travel all over this territory during the hail season. Whether during that period I ever observed any storms in Beaver Creek valley prior to 1929, will say I never saw any cloudbursts; I did see some severe storms, hail storms, or what they call very heavy rains; sometimes they wouldn't be over three or four or five miles in extent.

I was not in town in June 1921, when there was some high water there; I was there the next afternoon. I didn't notice any damage there to buildings from high water at that time. I didn't hear of any.

I was at home in Wibaux on the morning of June 7, 1929; in pointing out where by building was at that time, I am “turned around” here. Here was my house here (pointing). My house was the



(Testimony of Charles M. Woodard.)

second house north of the community church and on the west side of Wibaux Street,—south of First Avenue North and also facing on Wibaux Street. Also, I had a place of business on the south side of the track at that time,—in these buildings here—these blocks here—in that large block; that is the second block south of Orgain Avenue and on the east side of Wibaux Street; I had my place of business in there. I woke up on the morning of June 7th, shortly after 6:00 o'clock. As to what I did when I first got up, will say—my youngest son had bought some young chickens and they were out in the front yard in the coop. During the night, my wife worried about them. Shortly after 6:00 o'clock I got up to see if they were all right; I went out in the front yard. After I had found out how the chickens were, I just looked up Wibaux Street and saw water coming down Wibaux Street—I look south; I looked through the underpass or viaduct. I could look through on the street through the embankment. The water was up south of my place of business,—as I just pointed it out. The water was flowing north. It hadn't gotten down clear to Orgain Avenue at that time. I then got my family up; they were in bed [560] at that time—still in bed—the family, my wife and son and daughter. In getting them ready to get out, as to time, they were up and dressed I think in about 20 minutes. When I told them to get up and dress,—I didn't know what they was doing

(Testimony of Charles M. Woodard.)

—but by the time they got dressed, the water was down in front of our place and up on our porch, and we decided we would have to leave the house. As to what we did in getting out of the house and how we got out,—my married son and his wife was rooming with us and he—when his wife got dressed—she was dressed—he carried her to the high land west towards the high school and came back and carried my wife to higher ground, and he made the third trip and helped me to higher ground. They went west to get to higher ground. By the time I got out, as to how deep the water was to the south side of my building—or by the time he helped me out,—it was four feet high or better. Then I went down to the railroad; my wife stopped at the school house I think—that is the high school building up here (pointing)—and I came to the—I was there at the underpass or viaduct. When I got down there, I didn't attempt to go down to my place of business because there was too much water. When I got down to the viaduct, from the position I had there by the viaduct I could look south on Wibaux Street. When I got down there, there was lots of water coming down Wibaux Street. At that time, I think it was four feet deep in the streets. It was coming from the south; it was running north, coming from the south, passing under the viaduct. There was other water approaching that viaduct from other directions; there was water coming from the east between the lumber

(Testimony of Charles M. Woodard.)

yard and the railroad, and there was water coming down from the west along the railroad embankment. Along the right-of-way there immediately north of Orgain Avenue, the ground is considerably lower there than it is on Orgain Avenue—it is lower. As to the effect that it had immediately south of this viaduct, when the [561] three streams of water came together—one going north on Wibaux and one west from the river and the one east along the railroad track—will say that there was kind of a “churning” to go under,—sort of a whirlpool effect.

I stayed on the embankment for some time; I was there most all of the day. I had an object by which I could fix the height of the water as it kept rising on the south side; it was the north wall of the Orgain Building; the Orgain Building is across the street from the lumber yard. The wall had been painted black and then in white letters, the word “Groceries” had been painted. When I stood there, as to how it compared with the word “Groceries”, it got to the lower edge of the word “Groceries”. The height of the lower edge of this word “Groceries” I think was about six feet. At that time, when the water got up about six feet, there were automobiles parked around on Wibaux Street around the corner; there was two on either corner, and we could see about six inches of the top of the car. My attention having been called to defendant’s exhibits D-26 and D-27, will



(Testimony of Charles M. Woodard.)

state that I recognize those as scenes that I saw while standing on the embankment and looking south down towards the Orgain Building; that looks like it. The both of them are pictures that I recognize as conditions that existed there at different times during that flood.

Mr. HALL: We will offer these two exhibits D-26 and D-27.

Mr. COLTON: No objection.

The COURT: They may be received.

In each of these pictures they show the word "Groceries" that I have just testified to, on the north side of the Orgain Building, and also shows some of the automobiles that were standing out there.

While I was standing there, I had occasion to watch the water north of the track as it flowed down by my home; there was [562] something on that side of the track by which I could gauge the depth of the water above the ground as compared with the depth of the water along the south side of Orgain Avenue; there was tree limbs projecting out over the walk so that I passed under that tree as I went down the street. (Witness standing up), I as six feet tall. That tree was on the east side of the street and a little south of the south side of the community church; it would be along pretty

(Testimony of Charles M. Woodard.)

close with the junction of Nolan and Wibaux Streets—I think it was right in here (pointing), right in here about the east end of Nolan. I said there were some limbs there that projected out over the sidewalk and in passing under those limbs, I would have to stoop or take my hat off. The water got up in those branches. If it was touching those limbs of the trees, as to how high up it was at the word “Groceries”, will say it was up to the highest point. I would say it was six feet deep when it was touching those limbs. The depth I would say it was over here and coming to the lower edge of “Groceries”, that was six feet above the sidewalk I think,—likely seven feet above the ground. The water got about two and a half feet in my residence down there. The floor was about 28 inches from the ground under my house.

Going back to 1909. I heard that testimony here of one or two witnesses, that for a long time,—for a great many years—after the bridges were built and the permanent bridge as built there in 1898, that they used to drive under the bridge and by the piers. While I was there operating those elevators, I never saw anybody driving through there at any time. While I had the elevator north of the track, I will show you how people in bringing in grain from south of town, drove to get to my place. Here is Wibaux Street and here is the county bridge. I am speaking of people coming from south of town,—at that time, they

(Testimony of Charles M. Woodard.)

came up over; there was no viaduct in 1909. So they had to haul their grain up over the grade, then they went down along the right-of- [563] way and forded the creek—forded the creek north of the bridge and came up to my elevator. When the elevator was torn down and we moved to the south side of the track, we had to haul material down there; we had about 2,000 bushel. To haul that to the elevator on the south side we had a team and wagon-tank and went west, Wibaux Street and then up over the embankment and came down to First Avenue South; and during that time, I say, there was absolutely no way to drive under that bridge there.

In my store there in the south of town, the water got about five feet deep I think it was.

Q. Did you sustain damage in both houses?

Mr. COLTON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Yes; we better confine ourselves to this case.

Q. Did you ever bring any suit against the railway company, or make any claim against the railway company for any damage?

Mr. COLTON: Objected to as incompetent, irrelevant and immaterial and has absolutely nothing to do with this case.

The COURT: Yes; I think it is immaterial whether he did or didn't.

Q. While you were standing on the embank-



(Testimony of Charles M. Woodard.)

ment the morning of June 7, 1929, state what, if any indications you saw of water backing up towards the south?

A. I didn't see any water backing up towards Wibaux Street. This water flowing north on Wibaux Street all the time, what I would say as to the speed at which it was flowing,—I don't know about the speed of water Mr. Hall, but I know that I couldn't walk as fast as that water was running. It was not smooth, placid water as it was running down towards Orgain Street; it was in waves; like rapidly moving water.

Cross Examination:

(By Mr. Colton).

I got on the embankment shortly after 7:00 o'clock and [564] I was standing on the embankment during that morning, on the west side of the viaduct; I was looking towards the south and the north most of the time—I had interests both ways.

Q. Did you see a wall of water five or six foot coming down there at any time during that day?

A. I didn't see any wall of water.

Q. You heard Kimball testify that he saw a wall of water coming down Main Street five or six feet high. Is that statement correct as far as you know?

A. As I say, I didn't see any. That was around 6:30 when I got up and looked down Main Street from the viaduct. As to whether the viaduct was open at that time and as to whether there was

(Testimony of Charles M. Woodard.)

much water going through the viaduct at that time, will say that there wasn't any coming through when I first saw the water on Wibaux Street. As I looked towards the south from the viaduct down Main Street, I saw the water on Main Street coming down.

Q. And there wasn't any water here at that time (pointing); it was just coming down here (pointing)?

A. Yes, sir.

In regard to driving between the piers and the abutments, of course I didn't come to Wibaux until 1909; I was there and bought my land in the fall of 1908. I don't know whether there was a dam north of the bridge at that time—I have no way of knowing; but in 1909 there was. If there was a dam there, it would be utterly impossible for anyone to drive through there.

Q. In regard to this tree and compared to the water; you say this "Groceries" here was exactly the same height as this right here (pointing)?

A. No, I didn't say it was the same height,—nearly so. It was nearly a foot lower. I was there on the embankment when it kept coming in the pieces, kept breaking away.

Q. Naturally, the water would raise on the north side?

A. It didn't go out and make any great big wide opening at one time. I said the water was about two and a half feet in my house there. Of

(Testimony of Charles M. Woodard.)

course, I don't know when it reached that particular [565] point, whether it was before the embankment broke or after.

Redirect Examination:

In the 1929 flood, as you understand, at Wibaux Street there was quite a depression as you went down under the viaduct.

Q. And this low ground on either side of the track where water was coming in, was several feet lower than any of the land to the south or north——

Mr. COLTON: Objected to as repetition.

Q. A person standing at your house and looking under there and looking at the level of that?

Mr. COLTON: We object. The witness testified there was no water going under the viaduct.

The COURT: What time are you referring to?

Mr. HALL: He said at 6:00 o'clock he looked up, and counsel asked him if he saw any water going under the viaduct and he said he didn't know. I am asking him now, if he was standing and looking that way to the south, whether he would be able to see water coming in.

The COURT: Answer the question. Overrule the objection.

A. No, I didn't see any.

Recross Examination:

I don't know whether my house is about the same level as the Congregational Church; there



(Testimony of Mrs. Hayes.)

wouldn't be much difference; it might be a little lower.

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MRS. HAYES,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

I live in Wibaux; have lived there about 12 years; was living there in June, 1929, in the Davis Addition. I got up about 5:00 o'clock on the morning of June 7th. We did our chores at [566] that time and we saw the neighbors out and we went up Beaver Creek a ways; we went up to the "red" walk—the cinder walk. I didn't go as far as the county bridge. I observed Beaver Creek at that time. At that time the water was very high and some people came out and told us we better go back; that the telephone poles were falling over; that we might be struck by a live wire.

Q. Do you know where the telephone pole was that was blown over?

A. I think it was the telephone line going down towards town. We didn't stay down on the cinder walk; we went south of Mr. Sletten's house over towards the creek bank. From that place, we looked out across the creek and the water was coming very high; well, it looked like the water coming over a dam, to me; that is as near as I could de-

(Testimony of Mrs. Hayes.)

scribe it. This water, like it was coming over a dam, I saw that just about opposite the bend in the creek there just back of Mr. Meek's house—Randy Meek's house—the creek makes kind of a bend there; it was right in here (pointing out on the relief map).

Mr. McCARTHY: Witness indicating a line running approximately east and west across from the——

It was right in here (pointing); I was standing about here and I could see the water——

Mr. McCARTHY: Witness indicating the west-  
erly end of Alice Avenue.

Q. Now, the water extended across from there to where?

A. It was up to just about the top of the dam at that time and these banks.

Q. How far did it extend, if it did extend? How wide was it?

A. It was clear across the creek this way.

Q. Can you give us an idea on the map how far across it was?

A. I imagine it came clear across here, like this.

Mr. MAURY: Did you see it or just imagine it?

A. No, I didn't imagine it; I saw it.

Q. Try and indicate the best you can, Mrs. Hayes, how far west [567] that water extended.

A. Well, I couldn't tell exactly I don't believe.

Q. You have moved the pointer up and down there and kept it in motion.

(Testimony of Mrs. Hayes.)

A. As I understand it, the creek is coming around here, isn't it? That is right. I couldn't tell how far it extended across this way, but it was almost up to the top of the bank here. As to what else I observed there in the way of water,—well it came on down the creek and I didn't stay so very long there, and it came on down the creek and I noticed Mr. Ostby's chicken house go, and we had to go back home. Out in the water there that day, I saw some trees and some horses, and we had some hay racks by the green barn and they went down the creek.

Q. What direction did they take?

A. They went south,—or north, I meant to say; they went towards the railroad embankment. At this time we hadn't had any breakfast. We went home and had breakfast then. I mean by "we"—Mrs. Sletten, Edith Jones, and Mrs. John Lynch and her children.

I was living in Wibaux in 1921. I don't know what street it was, but it was not so very far from the schoolhouse,—near Dr. Keller's residence; it was the old Cowee house where Mr. Carroll lives now; that wasn't in the Davis Addition, but in the main part of town. That is what has been referred to as the high school; that is the building to the west, and north of the main line. I can't remember as to what I observed in reference to high water in 1921. I know the water came up to our sidewalk; I know the sidewalk was attached to the house



(Testimony of Mrs. Hayes.)

and I can't tell you anything more about the water in that year.

Cross Examination:

(By Mr. Maury).

Q. Do you remember somebody coming up on a horse to get the keys so the people could get into the schoolhouse to get dry? Do you remember anyone coming from over on the west side of town across [568] the railroad bridge to get the keys from the janitor of the high school there so that the people could get in, and that that man borrowed Edith Jones' horse to ride across the water to the janitor's office to get the keys?

A. They possibly did,—not that I know about that—not that I saw; I didn't hear the conversation or anything.

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CARL ROWE,

being first duly sworn as a witness in behalf of the defendant, testified:

Direct Examination:

(By Mr. McCarthy).

I live at Fort Morgan, Colorado. My business is farming. In June, 1929, I was living in Wibaux, Montana. At that time I was in the garage business. I was in Wibaux on June 6th. I had occasion to go out in the country in the afternoon of that date. I went about 23 or 24 miles southwest of Wibaux. I made some repairs out there at that

(Testimony of Carl Rowe.)

time and then returned to Wibaux. We encountered a storm on our return trip. As to the conditions as we encountered them 20 or 25 miles south of Wibaux on the afternoon or early evening of June 6th,—well, we got the work done sometime in the evening—I don't know what time it was—it was getting late and we started for town in an easterly direction,—I don't remember just what road it was on now—but it got raining so hard we had to stop. I did the work out there at the farm for Charlie Casey; he was farming for somebody else. Describing the storm and what effect it had on me and the car I was in,—we drove as far as we could; well, it got so we couldn't see to drive any further. We must have stopped there 20 or 30 minutes, maybe longer than that. It was not just a light rainfall; it was more like coming out of a washtub; then it kind of stopped, that is slacked up so we could see to go ahead a ways, and the road was practically level; and we couldn't see no road, the whole [569] thing was covered with water I would say from maybe three to five inches deep,—just like a lake we was driving through. I got back into town that night.

On the morning of June 7th I got up between 5:00 and 6:00 o'clock I think. I can point out better where my house was.

Mr. McCARTHY: Witness pointing to a house a trifle to the east of Drake Street projected, and south of Grant Avenue.

(Testimony of Carl Rowe.)

Q. When you got up there the morning of June 7th Mr. Rowe, will you tell us briefly what you saw there in the way of water—high water—and the action of the water?

A. I didn't notice anything unusual until breakfast was ready and I was sitting at the west side of the house by the window, where I could see to the west; I had full view of the west, and I noticed Massey had some horses in the pasture over there and they were going around, uneasy,—and I went on with my breakfast and I looked back again and I seen the water coming over, and there was waves, I suppose three to five foot high, that is the way it looked to me,—the height they was. Those waves came right on over north towards the town of Wibaux. I saw buildings or property moved there that day by that flood; the Methodist parsonage, I seen that float off into the creek and lodged against the railroad embankment. I know where the so-called Miller or green house is located. I saw buildings disturbed in the vicinity of that house; I seen a shed south of the green house wash away. After I see these buildings wash away,—I don't remember what time that was—I wanted to get to town and I went east from where I live up and around down by the elevators to the railroad bridge, and I think the water was just about at the highest point at that time when I got there at the railroad bridge. The water to the south of the railroad bridge at that time was



(Testimony of Carl Rowe.)

moving—it sure was,—moving north. I didn't any time there that day see any water backing up or moving to the south—I sure didn't. [570]

Cross Examination:

(By Mr. Maury).

Q. How did the people move in the Davis Addition from north to south; as the water rose, they moved down here towards Esther Avenue and this place up here indicated Olive Avenue?

A. They came up Beaver Street as they moved out. They moved from north to south.

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DEFENDANT RESTS

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REBUTTAL

DWIGHT DENNIS,

being first duly sworn as a witness in behalf of the plaintiff in rebuttal, testified:

Direct Examination.

(By Mr. Maury).

I now live 30 miles south of Wibaux, in Ash Coulee. That is a branch or tributary of Beaver Creek. I have lived at that place about eight years. Before that, I lived on the Beaver Creek about three miles straight east of there; that was about 27 miles south of Wibaux; I lived there from 1902 to 1921. That is where I was first, when I came to Montana in 1902.

(Testimony of Dwight Dennis.)

I have observed every year the conduct and actions of Beaver Creek to the south of Wibaux and round about where I have lived. As to the actions of the creek in 1904—in the spring of 1904, in the break-up, we had high water, over the flat right up to our house. I speak of break-up; that is snow in the winter 1903-1904.

I saw the actions of the river the evening of June 6th and morning of June 7th, 1929. The water from that spring break-up in 1904 was as high at the buildings as it was on June 6 or 7, 1929. It remained from that snow, melting or breaking up, about eight or ten hours, I suppose. Later in 1904, about the middle [571] of May, we had about a week or ten days of steady rain; the creek was out of the bank up around the buildings. That rise in the creek later in 1904 as compared with the rise of June 6 and 7, 1929, it wasn't as high—it wasn't quite as high at the ranch buildings as it was in 1929. The next unusual occurrence of the creek was in 1907, about the 21st of June. That was from a cloudburst. Describing the dimensions of that cloudburst, or storm, as I call it, well the heavy rain was right up on the head of the Beaver, right on the divide between the Big Beaver and the Pennell Creek, and it flooded the flats, washed corals and hay stacks, and drowned cattle and sheep. Water was up 16 inches in my house—the only time it has ever been in the house since I have been in the country. Comparing that with the flood of June 6 and 7, 1929, well according to the marks there at the

(Testimony of Dwight Dennis.)

old buildings, it was about 21½ foot higher in 1907 than it was in 1929, and right at that particular point, the stream was 400 or 500 feet wider anyway, something near that. All the fences on the creek was washed away. Our corrals was washed away; all our machinery was washed away, and down at the Davis Ranch a mile and a half north, it washed some of the old sheds away; it washed a lot of their wool away and all of their machinery and pasture fences. Mr. Bushell has said there was no person living within six miles when he was there on a ranch in 1907; I was living a mile and a half south and about half a mile east of that ranch at that time.

Describing further rises of water after 1907 that have taken place in the Beaver Creek Valley and so far as they are to the south of Wibaux, well in 1909 we had high water; it was all over the flat. I was running sheep there at that time and it run us off the creek with the sheep; and in 1916 we had high water again. As to how the 1916 high water compared with the 1929 high water, it wasn't as high. And then in 1925 we had awful high water. In 1925 the high water taken all the bridges on East Creek; [572] that is the branch just east of where I live. Abrams lives right on that creek it had taken four or five bridges out right around his place. I don't know as I can give the size of those bridges exact, but there was bridges I should judge was possibly 20 or 25 feet, maybe some of them 30



(Testimony of Dwight Dennis.)

feet wide. There was four right on that creek taken out. I had occasion from a position which I occupied at that time, to observe the condition of the bridges after that flood. I was supervisor, looking after the county road bridges; and then up on the main Beaver there was two big bridges—steel bridges—went out there at Ollie in 1925. Those bridges were I should judge, 40 to 50 feet wide; they were across the Beaver. I speak of them as steel bridges,—pile—steel frame; they was on piling drove in the ground. The creek wasn't out of the banks in 1921; we had no high water up there. Someone up near Abrams spoke of losing some sheep, there were sheep lost in 1904 up near Abrams'; I was working for Davis looking after his sheep at the time and we had some sheep drowned just about where Mr. Abrams is. As to the height of that water right where the sheep were drowned, well I suppose the creek was a quarter of a mile wide anyway, at that time in there.

Cross Examination:

(By Mr. Jameson).

I said I live about 30 miles from Wibaux. During all that time I lived in that territory. My testimony with reference to high waters prior to 1929 is confined to the area around my place. In 1904 the spring high water was from the break-up of the snow melting. We had a hard winter that winter and it stayed on until the 1st of April, and it

(Testimony of Dwight Dennis.)

all went out in a short time and the creeks was all out of the bank. Then in the middle of May, it was just from a general rain—rained steady for a week or ten days and raised the creek out of the bank. This rain of May, 1904, was not a local cloudburst in my particular locality; [573] it was from a general rain in 1904. I was a witness in the case of M. C. Heckaman vs. Northern Pacific Railway Company, tried in the District Court of Fallon County.

Q. Calling your attention to your testimony on cross examination, page 993 of the transcript, will you just read to yourself, this portion of your testimony; just read that all, if you like.

A. Well, that is 1907. That should be 1907 was when we had the cloudburst—That says 1904.

Mr. MAURY: Perhaps, you got 1907 mixed up with 1904.

Q. Have you read this portion that I have indicated? Particularly from here down to here? Have you read it?

A. Yes.

Q. Now, in the trial to which I have called your attention Mr. Dennis, did you not testify as follows: "In this 1904 high water I couldn't say how far north that extended on down the creek. I know at the ranch where I lived on the main Beaver, it wasn't as high as farther east. The heavy rain was on the East Fork Creek. That was a local cloudburst in that particular locality."

(Testimony of Dwight Dennis.)

A. Well, in 1907 is where——

Q. Well, you testified as I have read, in the trial at Baker, in regard to 1904?

A. Well, I don't remember saying that there was a cloudburst in 1904; if I said 1904 I meant 1907, is when we had the local cloudburst. The cloudburst of 1907 was a local cloudburst, I said.

As to how far that extended down Beaver Creek, well the heavy rain was from Rattlesnake; that was about 24 miles from Wibaux, and it extended to the head of Beaver. The head of Beaver is about 30 or 35 miles from Wibaux.

Q. This cloudburst of 1907 extended the distance of from 24 miles to 35 miles?

A. The heavy rain was from Rattlesnake, about 24 miles south, to the head of Beaver.

Q. But from a point 24 miles from Wibaux there was no cloudburst?

A. There was no heavy rain that I know of. I don't know whether [574] that water ever got to Wibaux in 1907; all I know is hearsay from there on. In 1907, as to the distance down the creek that I went myself, I was 12 or 13 miles down, gathering up the wool, machinery and stuff that was washed away,—12 or 13 miles from my place.

Q. So that would be 18 or 20 miles from Wibaux.

The 1929 flood covered a much larger territory than the 1907 flood. 1909 was not a cloudburst; it was just from local rains; it was steady rains that



(Testimony of Dwight Dennis.)

raised the creek in 1909. My testimony in regard to 1909 high water is confined to that area around my place, and so far as I know, that did not extend into Wibaux; I don't know what it was in Wibaux, but it was purely local rain in my locality.

With reference to the 1925 high water, I said that washed out some bridges on the East Fork of Beaver Creek. The East Fork of Beaver Creek that is on the creek Mr. Abrams lives on; it heads from down towards Carlyle. As to how far from Wibaux; that would be about 28 or 29 miles south where it empties into the Beaver.

Q. The East Fork of Beaver empties into main Beaver 28 or 29 miles—that didn't affect anything on the main creek between where it entered—East Fork—and the town of Wibaux?

A. It has not.

Q. And you don't know whether that reached the town of Wibaux? You weren't in Wibaux?

A. I wasn't in Wibaux.

Q. So far as you know, it did not do any damage between the point where it enters the Beaver and the town of Wibaux?

A. It washed out some culverts and small bridges in my district, but not below the county line; but not between that point and the town of Wibaux,—not as I know of.

Q. All of these heavy rains, cloudburst, and high water you testified to here were of a local nature, were they not?

(Testimony of Dwight Dennis.)

A. Well, yes. As far as I know, there was no effect at Wibaux from any of these cloudbursts or high water concerning which I testified this [575] morning; I don't know what it was at Wibaux, for I wasn't there; I am just speaking of the country where I live.

Redirect Examination:

I speak of the storm of 1907 being local. As to what the extent was of that storm, well it extended,—high water as far south as Marmarth.

Q. Where is Marmarth?

A. That is about 30 or 35 miles south and east—

Mr. HALL: We object as getting clear outside—

Mr. MAURY: They provoked that by asking if it wasn't local.

The COURT: Yes. By "local" is whether it extended farther north. Confine it to the watershed of Beaver Creek source. Let us not get "all over the country" there.

Marmarth is about 30 or 35 miles south and east of my place, in North Dakota.

Recross Examination:

With reference to the Beaver Creek Valley, as to how far north that storm of 1907 extended, north from my place, well the heaviest rains was about two or three miles north, that is, north, as the heavy rain; then it went on south; two or three miles north from my place and then south.

Q. But not north from that point?

A. Well, I don't know what it was from there on.

CHARLES O. NELSON,

being first duly sworn as a witness in behalf of the plaintiff in rebuttal, testified:

Direct Examination:

(By Mr. Colton).

My name is Charles O. Nelson. I live 25 miles south of Wibaux. During the year 1907 I lived in Wibaux County—not where I live now; I live west of there. I saw a lot of water there in 1907. There was a lot of rain there and the creek was [576] high there right below this place where I live at this time. The creek was anywhere from a half to a mile wide there—somewheres in there.

I was south of Wibaux June 6 and 7, 1929. I observed the high water there at that time.

Q. Are you in a position to make comparison between the 1907 flood and the 1929 flood at your place?

Mr. HALL: We object to that. There is nothing to show that he was down there in 1907 and 1909 (1929), so there is nothing to make comparison. You can't make comparison at Wibaux and 25 miles south.

The COURT: I understood he was comparing water in his locality in 1929 and 1907—at his locality—is that it?

Mr. COLTON: That is it.

The COURT: Go ahead.

Q. I am asking you to compare at your locality, —if there was any difference in the high water of



(Testimony of Charles O. Nelson.)

1907 and high water of 1929,—which was the greater?

A. The 1907 was the highest water of the two. As to how much,—probably a foot and a half or a little greater—more or less.

I think in 1909 there was high water there running over the flats; and several other times,—1921, 1925. The 1925 flood went over the banks there too.

I think it was around about 10:00 o'clock as near as I can remember, on the morning of June 7, 1929, that the water was highest at my place. I live 25 miles from Wibaux.

#### Cross Examination:

(By Mr. Jameson).

My testimony has been confined to the area around my place some 25 miles from Wibaux; that is where I live. As to how far I saw the creek in 1907—evidence of high water following the storm of 1907—well, at the head of the creek; from the head of [577] the creek. That is over 30 miles from Wibaux. Going down the creek, as to how far I saw any evidence of high water in 1907, well I seen it quite a ways on down; I wouldn't just exactly say how far it was. I went down into Wibaux sometime after; I didn't see any evidence of high water going into Wibaux—I don't think I did that I remember. Immediately after the high water in 1907, I was down the creek, down around the "Hook", and on down. The "Hook" is about 20

(Testimony of Charles O. Nelson.)

miles from Wibaux. My testimony with reference to this high water of 1907, and storm, is confined to a distance 20 miles from Wibaux to a distance of 35 miles from Wibaux, on Beaver Creek. As to the distance from 20 miles out of Wibaux on into Wibaux, whether I know what the condition was—well, I know there was some water. Edgehill is about 20 miles from Wibaux; that is the “Hook” I called it; they also called that the Sheep Hook Ranch; also called it Edgehill—we did later.

With reference to high water of 1909, that was purely a local storm as I remember it. It went over the banks in Beaver Creek, at the point in the Valley where I was at—at the place I live at the present time. In regard to how far from that I saw evidence of high water, I don’t think I went down the creek at that time; I just crossed it there at that time, so my testimony with reference to this high water of 1909 is confined to the area around my residence some 25 miles from Wibaux. I don’t know as there was any high water on down towards Wibaux; it was just a local cloudburst in my area, is the way I understand it.

The high water in 1929 was far more extensive than the high water of 1909 and of 1907; it covered much greater territory on Beaver Creek.

**Redirect Examination:**

Q. Did you say that the 1929 flood covered a greater territory than 1907 south from your place?

(Testimony of Charles O. Nelson.)

Mr. JAMESON: Objected to as immaterial what the condition [578] was south of his place, which was 25 miles south of Wibaux.

The COURT: Well, he says it was more extensive—the flood of 1929. You may interrogate him as to the extent in that watershed, Beaver Creek.

\* \* \*

Mr. COLTON: That is all.

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TOM SLETTEN,

being first duly sworn as a witness in behalf of the plaintiff in rebuttal, testified:

Direct Examination:

(By Mr. Maury).

On June 6 and 7, 1929, I was living at Wibaux, Montana. The house where I lived is right there (pointing on relief map). I got up about 5:30 I think, on the morning of June 7th. When I got up, Beaver Creek at that time was up over its banks—quite high—it kept raising. I think I was up about an hour and a half before the county bridge went out. I did not see any wall of water that morning or that day at all; I don't think there was any such phenomena there, because I was watching the creek all forenoon. People in the Davis Addition around my place, moved south. As to what caused them to move, the water kept backing up from the railroad. There might have been a



(Testimony of Tom Sletten.)

very little water in my yard that morning, but not much, because I was three or four blocks from there when the water was the highest. I did not see Edith Jones that day at all. I knew her and had known her for a long time.

Cross Examination:

(By Mr. McCarthy).

Q. Mr. Sletten, did you hear any rumbling of water there that day?

A. Well, the creek would naturally make a little noise you know; it was quite heavy; it made quite a little noise that day. I didn't keep any chickens; I didn't have any.

Q. You lived fairly close to the places where the chicken coops [579] were carried away?

A. No, I don't think; the chicken coop that I saw was from the other side of the creek, and there might have been one on our side, come to think about it now, that went down.

Q. Now, Mr. Sletten, when you speak of the people going south, you mean that they went south-east into the hills?

A. Straight south. Straight south is high ground.

Q. By "straight south" you mean the general hill on which is located several houses, in one of which Mr. Massey took refuge?

A. Well, that is west too as well as south, Massey's is. As I understand, Mr. Massey left his place and went east across the road. This place

(Testimony of Tom Sletten.)

across the road east of Massey's is called the Drake place. I know the name of this place east of the Drake place, but I can't think of it.

Q. You mean when the people left the Davis Addition, they sought the higher ground to the south of the Davis Addition somewhere in the general locality of the Drake house and the house to the east of the Drake house?

A. They didn't go that far south.

Q. They went in that direction, I take it, so that if the water kept getting higher, they could get over on that hill?

A. The Drake place or the Massey place is west of where they went down.

Q. I call your attention to a group of houses to the east of the Davis Addition and a short distance east of Regina Street. Can you tell us the owners of any of the houses in this group that are located north of Lincoln Avenue and south of Alice Avenue, projected, and east of Regina Street?

A. I believe it is Palmer, and this is Dr. Bonner's place up on the hillside here. Immediately to the east of the Davis Addition, there is a hillside there. I have given the Palmer house as one of the houses in this group; and east of the Palmer house there is a hill, and to the south there is also a hill, —further this way. [580]

## WESLEY WHITE,

being first duly sworn as a witness in behalf of the plaintiff in rebuttal, testified:

## Direct Examination

(By Mr. Maury).

I am a son of Mr. Charles E. White who has testified here, who owned a newspaper and printing shop in Wibaux. I am a married man, and I was living with my wife and child in the Davis Addition on the days of June 6 and 7, 1929. The Davis Addition is right here (pointing). This is Bushman Street to the west of me and Olive Street to the south; I lived right on the corner. I got up probably a quarter after 6:00 on the morning of June 7, 1929. We were sleeping with the bedroom window open and what caused me to awaken I could hear somebody talking outside excitedly. It didn't take me very long to dress—probably 5 minutes. Immediately upon dressing, I went out and asked these young fellows what the excitement was and they told me. Then I went down on Beaver Street as far as Ostby's corner here (where you are pointing). The creek was very high at that time—unusually high—and it was just beginning to trickle over into the street in front of the postoffice and telephone office at that time, across the creek from where I was then; my father's printing shop was where I could see it. That morning, my father and mother were living right here (pointing).



(Testimony of Wesley White.)

Mr. MAURY: Indicating a house in the middle of the block to the west of Main Street and to the north of—what street there?

A. On Nolan Avenue. As to what I did then with reference to visiting my father's and mother's place,—well, just as quick as I left Ostby's, I went back home and talked with my wife a minute or two and we seen that the printing office was in danger, and I wondered about my father and mother, so I went up over the hill. I went right in here (indicating), between the stockyards and the oil station—one of those buildings; then I came up onto the [581] Northern Pacific tracks and came down the track across the bridge. I found, with reference to the safety of my father and mother when I got over there,—well, I could see from the railroad embankment that they had got up on higher ground. As I crossed this railroad bridge at that time, describing the condition of the waters to the south of the bridge, will say that the opening in the railroad bridge itself was full and then on either side of the east and west side of the opening, the water was very much higher there, probably four or five feet. The water couldn't get through you know and it was backing up around—backing up to the east and backing to the west. As to the direction that the waters were taking that were backing to the east or going to the east, will say they were backing and coming around—just making a circle and coming past around the elevators into the Davis Addition.

(Testimony of Wesley White.)

The direction that the waters were taking that were going to the west, they were backing towards the depot, making a swing around; I mean after they backed around to the west, they swung around in a circle and back into the town, that way (pointing).

I stayed on the west side probably 45 minutes that morning.

Q. What caused you, if anything, to come back over into the Davis Addition?

A. Well, I talked to my father and mother and a man by the name of Mr. Faltermeyer, and many of the people were wet, and Mr. Faltermeyer wanted to be some place where they could dry their clothes you know, and he asked me about the janitor of the school; he lives over in our part of town in the Davis Addition; he asked me if I saw him that morning and I told him "No, I had not." He asked me if I would go and get the keys and bring them back to him.

Mr. McCARTHY: I don't believe this conversation is——

The COURT: No.

Mr. MAURY: The objection is very late.

About getting the keys to the school house, I came back the same [582] way I come.

Q. Where did the janitor live? Did he live in the Davis Addition?

A. He lived just west of Beaver Street. When this request was made to get the keys to the school house, I came back the same way I come and I met——

(Testimony of Wesley White.)

Q. Where was the school house, first?

A. This is it (indicating). When I got back over there, the water had backed up into my house and I seen I couldn't get over to the janitor's place without wading, and as I was coming over, I could see this Edith Jones; she was just coming down the hill on her horse; she was coming on the horse from south; with reference to Ira Parks' place, she was coming from that direction. When she got there I asked her if I could borrow her horse to go and get these keys from the janitor. She said I could, so I got on the horse and went over there and got the keys from the janitor. As to the time of day that was, as near as I can figure it now, that I borrowed the horse from Edith Jones, it was possibly between 8:00, and probably 8:30. I then returned over the bridge with the keys; I went back the same way I come—over past the stockyards and back onto the railroad tracks. On the second trip back into the west side of town, the embankment was sloughing a little, slightly at that time, because I hurried back with the keys.

#### Cross Examination

(By Mr. McCarthy).

I was associated there with my father. I was not the Associated Press correspondent. My brother is the Associated Press correspondent; his name is William. He is not here. I won't say whether it was my brother or not who sent out the dispatches for the Associated Press to the Billings Gazette cover-



(Testimony of Wesley White.)

ing that storm, because there was some Associated Press correspondents there at Wibaux soon after; he might have done that, I don't know. I didn't send out the story that was printed in the Billings [583] Gazette in the evening edition of June 11, 1929.

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MRS. PATRICK COYNE,

a witness in behalf of the plaintiff in rebuttal, testified:

Direct Examination

(By Mr. Maury).

On June 6 and 7, 1929, my husband and I were living a mile west of town—no, a mile south of town; we lived just exactly west of Massey, across the Beaver River. I got up that morning between 6:00 and 6:30. I was up first, and I noticed a lot of water. That water was right along the creek, and I looked towards the elevators and saw some water there and I went back in the room and told Pat about it; I woke up Mr. Coyne, and we had breakfast and I was around home maybe an hour and a half before we went to town. During that hour and a half, with reference to observing the stream and the water,—well we just noticed there was a lot of water around there. My attention was directed to the water most of the time.

Q. What if anything, did you see with reference to any wall of water,—anything that resembled any such phenomena?

(Testimony of Mrs. Patrick Coyne.)

A. No, I didn't see that; I just saw a lot of water going gradually towards Wibaux, but I didn't see any walls of water,—not then.

Cross Examination

(By Mr. McCarthy).

Q. The water you saw, Mrs. Coyne, was just flowing towards Wibaux?

A. Well, it was just going,—as far as I could see.

I have looked at this relief map. I recognize what has been referred to here as the Massey Ranch. I live west of Massey's place—I would call it west; I think it is directly west of Massey's place about a quarter of a mile; we live on the high ground west of Massey's.

Redirect Examination

Our place is not on this map,—no house that corresponds with our's. [584]

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EUGENE PARKER,

being first duly sworn as a witness in behalf of the plaintiff in rebuttal, testified:

Direct Examination

(By Mr. Maury).

On the morning of June 7, 1929, I was living at home with my dad. My home, by going around the road, is a mile from Joe Burke's place; by going across the fields, it would be a little better than half a mile.

(Testimony of Eugene Parker.)

Q. What did you observe early in the morning of June 7, 1929, or someone at your place, observe about Joe Burke being caught away from his house by water coming down a slough there?\* Could you see where it was that there was water at Burke's place?

A. No, you couldn't see Joe Burke's buildings from the place. I went to Burke's place from my place that morning; I took a Ford coupe and drove down. The direction I took to get to Burke's place was half a mile east and half a mile north. I got to Burke's house by just driving up the road. When I got there with the Ford coupe, Burke was over on the hay stack north of his house and the boy was right west from the hay stack over on the fence post along the road,—the boy, his nephew. I drove right up to Burke's house with the Ford car, within two or three feet of it. There was no water in Burke's house then.

I have a smaller brother; he was there following me on horseback. When he got there with the horse, I took the horse and got Earl Sawyer and took him to the house and then got Joe Burke and took him over. The water in the slough was up to the stirrups; I got my feet wet. Right in the slough it was running fairly swift. The water wasn't very troublous to the horse, outside of some trees and dead sheep that come through. Then after I got Burke and Sawyer to the house, the road was too wet for me to get the Ford out of there; there was



(Testimony of Eugene Parker.)

a swale and there looked to be quite a little water coming through there. I didn't take the Ford [585] through there; I took the horse; all of us got away on the horse. As to how much time elapsed between the time I brought that Ford over the flat and the time I went out on the horse,—well it couldn't have been very long; I wouldn't say just for sure, because we was hurrying around there all the time, you know; we got away just as soon as we could and I wouldn't say just how long it was. I got the Ford after that; I don't think we got it until the next day or two. Nothing serious happened to the Ford.

#### Cross Examination

(By Mr. McCarthy).

When I got on this horse, Joe Burke was marooned over on a hay stack. I went over and got him; I got the boy first. I wouldn't say how old the boy was, but somewheres about 13 years old. He was hanging onto a post with his arm around it. Whether the water was carrying his feet out from under him so his feet were downstream, will say I didn't notice where his feet was. I got over there on the horse and got him off that post and out of there as fast as possible.

Q. And then you went over and got Burke and got him out?

Mr. MAURY: We object—nonsense.

Mr. McCARTHY: Nonsense—when men's lives are at stake?

Testimony of

M. P. OSTBY,

who had been first duly sworn as a witness in behalf of the plaintiffs in rebuttal, at the trial of Case No. 2444, Wibaux Realty Company, a corporation, (and other cases) vs. Northern Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Montana, on the 16th day of January, 1934, was read at this time by the court reporter, as follows:

“Direct Examination

(By Mr. Colton). [586]

My name is M. P. Ostby. I am County Extension Agent, Wibaux County; I live in Wibaux; on June 6 and 7, 1929, I lived in Wibaux. At that time I lived over in what they call the Davis Addition. That is this house right here with the fence around it. On the morning of the flood at Wibaux, morning of June 7th, I was over around that part of town. I got up about 5:00 o'clock that morning. I noticed a man by the name of J. E. Trollope around there that morning. I can't say that I noticed a lady around there by the name of Mrs. Edighoffer. During that morning I noticed a yellow house go out right over near the water tank. As to who that house belonged to, some people by name of Breitenfeldts lived there I think. I can't remember exactly the time that that house went out, but it went out sometime before the parsonage went out. High water took it out. It wasn't a wall of water; the water got

(Testimony of M. P. Ostby.)

too high—the raise of the water—gradual raise, perhaps. During that morning I observed Beaver Creek towards Massey's and towards the county bridge and all around there. I didn't notice any unusual conditions about the water that morning—any wall of water; I didn't see any wall of water that morning at any time.

### Cross Examination

(By Mr. McCarthy).

I said the yellow house was occupied by people by the name of Breitenfeldt; I don't know who formerly owned the house. I didn't know a family named Mauser. I have lived in Wibaux since January, 1928. I don't know the people then that lived there and built the house—the occupants of early-days. I wouldn't want to say that a family named Mauser didn't live in there at some time. I don't know whether Mrs. Breitenfeldt's maiden name was Mauser; I couldn't say. Locating my house on the relief map, I believe it is this house immediately southwest of the intersection of Esther Avenue and Beaver Street. Around the house is a [587] white line outside of the house and the yard, that is a wall of scoria rock, and this small building to the rear and north of the house is the garage; and the back of the garage is the chicken house. The chicken house was washed away there during the flood. In defendant's exhibit Y-33 I recognize the left-hand corner as the scoria wall referred to by me; and part of the city water tank is shown; and then the



(Testimony of M. P. Ostby.)

building to the right of the city water tank, it is that green house; that is the green house that was occupied at one time at least, I think by Mrs. Mattie Miller; at any rate, it is a green house. Then continuing further to the right, that building over which you are now holding the glass is the church, and that building to the right of the church is an old barn I guess. That correctly portrays the situation, I suppose, at one time, as it existed in the vicinity of my house on June 7, 1929.

Mr. McCARTHY: Defendant's Y-33 is offered in evidence.

Mr. COLTON: No objection.

Q. Will you explain to the court and jury what all these marks are there in the water? Look at it closely through the glass.

A. You mean the waves there?

Q. Yes; that is what I would call them also. That is close enough. That is all.

#### Redirect Examination

Q. Mr. Ostby, that rough surface of the water, those are just ripples or—what caused that? What caused those ripples on that picture?

A. I think the cause was that at one time during the morning there—the forenoon—it was very windy, and waves were caused from that wind; that is my idea of it.

(Testimony of M. P. Ostby.)

Recross Examination

I couldn't say whether that object just to the right and about the middle of the picture, is a part of the road grader sticking out of the water or not. [588]

Q. There was a road grader turned over near your place was there not?

A. That must have been some object floating by, but I don't know what it was."

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TOM SLETTEN,

recalled as a witness in behalf of the plaintiff in rebuttal, testified:

Direct Examination

(By Mr. Maury).

I am acquainted with John Presthus, the section foreman who was there for many years. The last time I saw him was about a week ago, in Wibaux. He was walking around; seemed to be in good health, as far as I know.

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Testimony of

H. W. PALEN,

who had been first duly sworn as a witness in behalf of the defendant, at the trial of the case of M. C. Heckaman vs. Northern Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and

(Testimony of H. W. Palen.)

for the County of Fallon, at Baker, Montana, (September and October, 1931) was read at this time in rebuttal, by Mr. Maury, of counsel for the plaintiff, as follows:

“Direct Examination

(By Mr. Hall).

My name is H. W. Palen; live in Dickinson, North Dakota, and am working for the Northern Pacific as a locomotive engineer. I was an engineer on June 6th and 7th, 1929.

I was called out on duty on the night of June 6th; was the engineer on the engine hauling this work-train just testified about by the other witnesses. We left Glendive a little after 3:00, around about 3:00 it was; we done a little switching after we was called,—done a little switching in Glendive, making up our train, the head-end of it. I couldn't tell exactly the time [589] we left there—between 2:30 and 3:00 o'clock. We went to Iona and switched out three cars ahead of the engine and proceeded to a small washout one mile west of Hodges, and repaired this wash out and proceeded in to Hodges. We stopped there; the roadmaster got a little information to look for high water at Wibaux. We went on in to Wibaux and we stopped, and as near as I can recollect, there was two cars on the viaduct when we stopped at Wibaux; they were ahead of the engine, and I sat there and waited in the engine until I got instructions from the conductor to back up



(Testimony of H. W. Palen.)

off the bridge. I backed up probably 250 or 300 feet, I stayed in the engine. I remained in the engine partly. I was down in front with this head car, but I was practically around my engine, practically all the time. From the position down at the front car at the east end of my train, I was not exactly in a position to see the movement of the water; that was not very handy.

I left the train standing in the position I stopped it after I made the movement back. My train stood in that same place until I started back for water. When we got the water and come back, we stopped it practically,—well, a little bit farther west than where it stopped the first place. I went down then and looked, then, I went along the cars and once, down to the edge of the viaduct. When I got back the second time, the water was higher than the first time. I saw water coming down Wibaux Street at that time. As to its depth, when I saw it,—when we got back to Wibaux, the second time,—when we got back to Wibaux, there was considerable water down Main Street and it had covered the top of a car, when we was there yet,—covered the top of an automobile. That was a car with a top; I don't remember what kind of a car it was. That water on Wibaux was coming from the south, coming down Main Street, and also coming along the embankment from the east and from the west. It was washing around in back [590] towards the Catholic Church, in that little ravine in there. I didn't observe the water

(Testimony of H. W. Palen.)

over to the east there in the main creek. I could see the water over there, from the viaduct, but that was all. I had to stay around close to the engine; I didn't go over there.

I saw things floating down Main Street and under the viaduct. There was oil barrels; there was a wagon; lumber; milk cans—they were moving pretty rapidly at that time, and then it seemed they didn't move quite so fast. There was a slashing of the water there at the south edge of the viaduct, but not so much; under the viaduct. There was a horse swam down with the stream just west of Heaton's Lumber Company, the old building there. He came up to the bank and went back out against the current and swam out in there next to the Catholic Church and went up on the bank and went west.

#### Cross Examination

(By Mr. Maury).

I don't know whether the horse is still going; I didn't follow it."

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#### Testimony of

H. W. EIDEN,

who had been first duly sworn as a witness in behalf of the defendant, at the trial of the case of M. C. Heckaman vs. Northern Pacific Railway Company, a corporation, in the District Court of the Sixteenth Judicial District of the State of Montana, in and for the County of Fallon, at Baker, Mon-

(Testimony of H. W. Eiden.)

tana, (September and October, 1931) was read at this time in rebuttal, by Mr. Maury, of counsel for the plaintiff, as follows:

“Direct Examination

(By Mr. Hall).

My name is H. W. Eiden. I live in Dickinson, North Dakota. I am working for the Northern Pacific and am a freight conductor. In June, 1929, was working on the second sub-division,—[591] the Yellowstone Division. I wasn't on duty the night of June 6th 1929; I was in Glendive. I did go on duty that night—early in the morning—about 1:35 or 1:40. We had a work-train, the work-train Kimball just testified about. From Glendive, with that train, we first went about 15 miles and made a switch on our train, then we proceeded to a small washout west of Hodges. We made the switch on our train—in order to fix a washout you have to have the stuff to fix it with and keep the engine from going in the washout, and you see, we put this material ahead of the engine so to fix the washout, and then go on with the train. Our instructions were to fix it at Hodges and then we were instructed to go from there—our destination was Beach, so we couldn't get to Beach without first fixing it at Hodges. For that reason, we had to have our gravel in front of the engine. We dumped the gravel and material necessary there and got the washout fixed at Hodges. Then we proceeded to Wibaux.



(Testimony of H. W. Eiden.)

We got to Wibaux about 6:30, —35, somewhere about that time. When we got there, we didn't go on through to Beach as directed. We stopped at Wibaux on account of the dispatcher displaying a signal to stop. After we left Glendive, I believe the roadmaster got word from the chief dispatcher, at Hodges, or received instructions from him, at Hodges, to look out for high water at Wibaux. When we stopped at Wibaux, we went into the office, that is, I did, to ascertain the cause of stopping the train there. As to what orders I got there: we were just held, for instructions. When we stopped our train at Wibaux, we stopped it at or near the viaduct; that was the head end. After I found out that we were held there, I didn't make any movement of the train right away—not for a little while—we stayed there a few minutes and we see we couldn't go, so we backed up off the viaduct west three or four hundred feet possibly; maybe 100 or 150. At that point, the train remained there possibly two hours. As to what we did [592] then: there was nothing to be done there with what we had in the front of the engine, so we had some rock on the train we took back to Beaver Hill, and in the meantime, got water at Heckaman, and came back with the rock ahead of the engine. We made a switch; we couldn't switch at Wibaux. When we came back with the rock, as to what we did with the rock, it was too late to do anything; we stayed there—backed off the viaduct and stayed there. We had

(Testimony of H. W. Eiden.)

put the rock ahead of the gravel, because gravel wouldn't have been any use and rock might have, and if we needed it, we could have. When we got back there, we found conditions—while we were gone, the water had raised and made conditions unsafe to do anything, so no rock was put in at all. During the time I was at Wibaux, I suppose I was in the caboose some of the time, but most of the time but most of the time I was out in the vicinity of the viaduct and depot—in the vicinity of the depot anyway.

Describing to the Jury what I saw in connection with this water, as I said before, we arrived at Wibaux 6:30 or—35, about that time, with this work-train and we were stopped—we had orders to proceed to Beach originally—we were stopped at Wibaux by high water; we stopped about 6:30 or—35, and the water at that time was coming just down inside the viaduct, and a few minutes later, it started coming down Wibaux Street. It raised steady until the time we decided to go back to Beaver Hill and get the rock down and do any good if we could, and when we got back in an hour or so, we decided it was too late and we didn't do anything,—so we didn't do anything. What I observed in the rise of the water, how much it rose, and things of that kind, well, at a period after it started on Main Street—well, steadily, as long as I was there, and possibly, down through the viaduct, it was going faster than any place else, or through the bridge,

(Testimony of H. W. Eiden.)

about the same. As I was there, it raised steadily, and as it got higher, different objects that were loose started floating down [593] the creek. I had gone back to Hodges with the train before the parsonage and the highway bridge gave way.

#### Cross Examination

(By Mr. Maury).

As to the height of the water before I left, on Main Street, we left twice there. The first time, it was possibly; it had just raised, going up, under the viaduct, a couple feet possibly. The height of the water on Main Street,—that is where I am speaking about—on Main Street—a couple feet possibly. And then I left, and I came back. Then, as to the height of the water,—I couldn't see how high it was when we came back; it was considerably higher.

#### Redirect Examination

Q. Did you see any automobiles or anything standing on Main Street or Orgain Avenue when you came back the second time?

A. Well, we could see them when we came back, but shortly afterwards, they were covered with water; and the color of the water was such that we couldn't see."



R. A. LYMAN,

called as a witness in behalf of the plaintiff in rebuttal, testified:

Direct Examination

(By Mr. Maury).

In regard to the accuracy of results obtained by Kutter's formula in such a cross section as the cross section which has been called "M" during the testimony of Mr. Lillis, will state that in my opinion, the accuracy would be much greater in a section such as that at Massey's or at Burke's. Explaining why: Kutter's formula is a formula that has been derived—to find the average velocity of the flow through a channel,—channel being more such where the banks are so that the water is in a compact body, more probably for such a channel as an [594] irrigation canal, and the farther it gets away from such a compact, uniform channel, the less reliable and less accurate it becomes.

From the testimony that I have heard at this trial about the bridge, its measurements as given by Mr. Clements, the records that have been introduced by the defendant, and my actual survey of the ground around the bridge, you asking as to what I have to say about whether the stream was restored to its original state of usefulness as near as may be, by the bridge that stood over Beaver Creek at Wibaux—the railroad bridge, from 1896 to 1929,—the original condition of usefulness could not have been restored because the great deal of evidence shows the fairly frequent backing up of water by the in-

(Testimony of R. A. Lyman.)

sufficient bridge opening. In my opinion, that channel undoubtedly, was narrowed by the bridge; I would say it was narrowed from about 170 feet to 65.

I heard the question of one gentleman on the jury to one of the witnesses for the defendant. As to whether there is any reason why that stream, Beaver Creek, on June 7, 1929, from Massey's to First Avenue South, should have been deeper in the valley where the valley was wide, than where the valley was narrow, will state that that reason was the results of back-water from the railroad embankment.

Having heard all of the testimony as to the bridge at this trial, having examined the history of the bridge from 1896 to June 7, 1929, as shown in the exhibits of the railway company,—knowing the size and condition of the watershed, and my own examination of water marks, as to what my opinion is as to the adequacy of the bridge to permit the free flow of such waters as would reasonably have been expected to come to the bridge, will state that in my opinion, the bridge was very inadequate from the day or the time that they filled between the abutments and the piers and, in my opinion, that condition was very evident after [595] the 1921 flood, that those conditions should have been—were self-evident to anyone examining them.

Q. And by inadequacy, have you reference merely to whether the bridge would stand or not, or with reference to the persons living and having their property on the benches immediately south of the fill?

(Testimony of R. A. Lyman.)

Mr. HALL: The defendant objects to further testimony along this line on the ground that it is improper rebuttal. They allege in their original complaint that the defendants were negligent in constructing an inadequate and insufficient bridge, and now this is simply coming in in rebuttal as part of their case in chief.

The COURT: I think it is a repetition; Mr. Lyman has already testified——

Mr. MAURY: The answer of the defendant speaks of a bridge with 110 feet of opening. Now, the testimony attempts to show the bridge was correct with different openings—openings that were not 110 feet; and this is addressed to that testimony.

Mr. HALL: They put in their testimony on that very question; they examined this witness at length.

The COURT: Proceed.

(Question repeated):

A. I have reference to both.

Q. Mr. Lyman, having heard all of the testimony of the defendant's witnesses here as to the bridge, what is your opinion as to whether any water would have gotten into the building shown to have been occupied by Nick Wagner on June 6 and 7, 1929, if there had been a bridge with openings 115 feet at Beaver Creek by the Northern Pacific Railway?

Mr. HALL: We object to that question as asking this witness to determine a question that was submitted to the Jury, and [596] improper examination on a question of issue that should be submitted to the Jury.



(Testimony of R. A. Lyman.)

The COURT: Oh, yes, you experts have testified to the adequacy of the opening. Overrule the objection. Let him answer the question, if he can.

(Question repeated):

A. I believe there would have been very little, if any.

Q. By "very little" how much?

A. I am very doubtful whether there would have been any. I wouldn't say whether it would have hit the floor of that building, perhaps. As to whether, in my opinion, it could have gotten above the floor, will say that no one could tell that right down to a fine point. My opinion is, I don't believe it would have gotten to his floor.

#### Cross Examination

(By Mr. McCarthy).

Q. Mr. Lyman, when you were on the stand the other day here, I asked you on cross examination, about your ascertaining as a maximum—your testimony with reference to having ascertained 16,000 cubic feet of water per second as the maximum amount of water on the day of the flood, and I called your attention to the narrative of your testimony given in one or more cases tried. I now call your attention, having since secured it, to the question-and-answer transcript, the verbatim transcript of your testimony on direct examination, in the case of Bailey, and others, vs. the Northern Pacific Railway Company, tried at Baker, Montana, starting on

(Testimony of R. A. Lyman.)

the 25th of September, 1933, and I direct your attention to the testimony given by you on page 382. Now, Mr. Lyman, when your attention was called to this matter the other day, it was your position, as I understand it, that the matter which I had called to your attention was given on an assumed statement of facts in answer to a hypothetical question, is that correct?

A. I thought the general line of testimony was in regard to that, [597] yes, sir.

Q. And it was your position that at the previous trials, your testimony was based on an assumed statement of facts, with particular reference to assuming that 30,000 cubic feet of water per second went through Wibaux. That was your contention?

A. Yes, that was the general line of testimony.

Q. I now call your attention to page 382 and ask you to read that page; and you may read a page or two preceding that, and a page or two following that, and see if that particular testimony, given on direct examination, being questioned by Mr. Maury, was in any way based on a hypothetical statement of facts?

A. No, I would say that this was a direct answer, —I think so.

Q. You are now referring to line 20 of page 382. May I now read? “Mr. Lyman, did you tell us how many cubic feet per second you would estimate that could have been going by Massey’s under the marks and having in view the grade of the stream?” An-

(Testimony of R. A. Lyman.)

swer: "I estimated 30,000 cubic feet could have gone by in the main stream at Massey's, disregarding any slowing up due to back-water."

Q. And that was your testimony in that trial?

A. Undoubtedly.

In ascertaining the amount of cubic feet of water per second, the application of Chezy's and Kutter's formulae is for use in connection with ascertaining the velocity; the problem is to get the velocity.

Q. No matter what the grade is, or where you take it, if you once get your velocity, it is an easy matter to get it by multiplying the velocity ascertained in feet-per-second,—multiply it by square feet on a given area?

A. If you get your velocity correct, you can get your cubic-feet-per-second correct.

Q. Now, you computed it—if you had conceded that there was 1190 square feet of opening at the railroad bridge over Beaver Creek——

A. I think so.

Q. The testimony shows that the water got up to the girder and [598] filling that entire area, you told us also that the velocity at that place was 27 feet per second?

A. The velocity just below that place.

Q. Mr. Lyman, multiplying 1190 square feet by 27 feet per second gives you more than 30,000 cubic feet per second?

A. I would suppose so.

Q. And if you had 30,000 cubic feet of water going out, how could you have 30,000 cubic feet



(Testimony of R. A. Lyman.)

going through the bridge, if you had only 16,000 running into it up above?

A. No. I never said you had 30,000 running through the bridge.

Redirect Examination

I have always at all of these trials, whenever it has been asked me, announced that there was, in my opinion, backwater at Massey's.

Q. And the question that was asked you was answered with that very provision?

A. I had it in mind; I don't know how I worded it, no.

Q. And have you always explained that the Kutter's formula had to be modified at Massey's in view of this back-water that existed there?

A. There would be no way of modifying Kutter's formula. Your results wouldn't be correct if there was an added height to the back-water there. As to whether that would lessen the amount of flow by the place, will state that if there was back-water, it would give you a larger answer to your problem than would be true if there was none there; and I tried always to explain that whenever it was asked me.

Q. Now, Mr. Lyman, (this is a very nice trick-question that the counsel asked), the speed of the water that counsel spoke of was where with reference to the bridge?

A. It is right at or below, the bridge. It is due to a 10-foot back-up of water there giving that 27 feet per second to the water that was left below, not

(Testimony of R. A. Lyman.)

to the height, so the water going through the bridge should [599] not have been attempted to be found out by multiplying the height above the bridge by the speed as it left the bridge,—of course not; the velocity is due solely to that 10-foot head of back-water.

Q. So that in finding out how much was going through the bridge, you would multiply the height—the cross section just below the bridge—and there would be a difference of some 10 feet?

A. It would just about cut the quantities—as he tried to make me say—in two.

Q. And the only estimate you have ever given of your own figures, at any trial, of the amount of water that you computed to be flowing by Massey's was 15,800 or roughly, 16,000 cubic feet per second?

A. That is the only one I did make for an estimate; I did estimate that 30,000 could have gone through.

Q. And I believe you did answer that if there had been a bridge 180 feet wide, that even 33,000 could have gone through the town?

A. Yes, sir.

Q. Or to the plaintiff's property?

A. That was true.

Q. That was true, and that was at the trial where the witness, Dean Shenehon, was a witness for the defendant, that a 189-foot bridge——

Mr. McCARTHY: I object to counsel making a statement of something that has no place at this

(Testimony of R. A. Lyman.)

time, going to the jury and you can't get it out.

Mr. MAURY: What I was asking the witness has been read in the record here by Mr. Lillis, on the stand.

Mr. McCARTHY: Why repeat it here?

Mr. MAURY: Because we want Mr. Lyman's opinion as well as Mr. Lillis'.

The COURT: Is this in rebuttal of Mr. Lillis' testimony?

Mr. HALL: No; he said he asked Mr. Lillis if he read Mr. Lyman's testimony on some point.

(Question repeated): "That was true, and that was at the trial [600] where the witness, Dean Shenehon, was a witness for the defendant, that a 189-foot bridge——" (Mr. Maury continuing with question): "189-foot bridge would have taken 33,000 cubic feet per second without any water in Wibaux above one foot?" (adding when question repeated): "without causing damage to the plaintiff's property?"

A. I think that was roughly the testimony; yes, sir.

Q. And you gave your estimate then as a 179-foot bridge, or 180?

A. I don't remember—my figures.

#### Recross Examination:

When the water was going through the bridge so that the entire capacity of the bridge was taken



(Testimony of R. A. Lyman.)

up, there was a lot of water going through the viaduct. As to whether the viaduct had about 500 square feet of area there, will say that I never seen any figures that a man could make any figures on the viaduct.

Q. Have you measured the viaduct?

Mr. MAURY: We object. There is a different viaduct there than on June 7, 1929.

The COURT: Very well; what were the conditions on June 6, 1929?

Q. You could form some approximation?

A. I never seen any estimates what I considered very reliable as to the depth of the water going through the viaduct.

Q. Assuming there was 500 square feet of area under the viaduct, and you have previously testified it was your opinion the water going through there was 18 feet per second?

A. Yes, sir.

Q. That would mean 10,000 cubic feet in addition going through, wouldn't it?

Mr. MAURY: We object,—something not in this case.

Q. Mr. Lyman, will you take your engineer's rule and consider the——

Mr. MAURY: We must object, that those particular measurements on the viaduct are not supposed to be exact surveys, or anything connected with it. We would have to open our case [601] to show the exact measurements of the viaduct so far as we could.

(Testimony of R. A. Lyman.)

The COURT: Are the exact measurements in evidence?

Mr. McCARTHY: I don't think the exact measurements are in evidence.

A. The worst objection was that the condition there as it existed at the bridge was that that water had taken a 6-foot drop.

Q. Can you give us by taking the engineer's rule on that viaduct, give us something about what the dimensions are? (witness measuring). Calling your attention to defendant's exhibits D-23 and D-24, Mr. Lyman, particularly to defendant's D-23; is the viaduct and the dimensions of it shown on here?

A. Outline; yes, sir. The dimensions shown on the exhibit referred to, I can't quite figure them out as yet. There is three bents of piling apparently, two center ones 18 feet apart, which would be 36 feet, plus some opening, probably about—as it scales, probably about 50 feet wide. Now, I can't figure these depths, just what they mean; the depth of 10 feet would give it about the 500 which you are trying to get.

Q. Would it be fair to say 500 would be the maximum and, for our computation here, take it 400 feet for the computation? As to the area here, would 400 be giving the plaintiff the edge——

Mr. MAURY: We don't want any edge on you and we don't want you to take any on us.

Q. Mr. Lyman, from your examination of the

(Testimony of R. A. Lyman.)

relief map and from defendant's D-23, can you tell us now approximately the opening under the viaduct?

A. I think the opening to the rails on the top of the viaduct would perhaps have 500 square feet of area in it; and 500 times 18 is 9,000.

#### Redirect Examination:

Of course, no such quantity of water could have been going through the viaduct; the 18 is for the elevation of the [602] water, after the water had taken the 6-foot drop; four feet would be 200 square feet instead of 500,—would be the maximum you could have; that would be 3,600 maximum. As I understand the testimony, the water never filled to the top of the viaduct—never got to that height. I remember Dean Shenehon referred to the water going through the viaduct, at the first trial, and took it into consideration with reference to the size of the bridge opening required here. And as to whether I took it into consideration on the estimate I gave once for 33,000 cubic feet a second, will say, if I remember that testimony, it was assumed that 10,000 cubic feet went through both openings in 1921, and assuming that 30,000 feet,—that that 10,000 went through without doing any material damage to the town, then assuming that 30,000 did come and the conditions remained the same at the viaduct, that a bridge a little less than three times as long as the existing bridge would have carried the 1929 flood with no more damage



(Testimony of R. A. Lyman.)

than the 1921 flood. I answered that a bridge three time as long would have carried it, and I believe that was Shenehon's testimony.

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PLAINTIFF RESTS.

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SURREBUTTAL

B. C. LILLIS,

called as a witness in behalf of the defendant in surrebuttal, testified:

Direct Examination:

(By Mr. McCarthy).

If you have ascertained the velocity, and have given the square area of a cross section, it is proper to multiply those two factors together to ascertain the amount of water going through that cross section; you thereby ascertain the cubic feet of water per second. [603]

Q. Did you hear Mr. Lyman's testimony that that formula would not apply if there was back-water at the bridge?

Mr. MAURY: Back-water at the bridge? Back-water at Massey's.

Q. The effect of back-water at the bridge, and therefore, that would not apply—multiplying the feet per second by the area.

A. Yes. I will give you my views as to whether that would or would not apply: By taking the

(Testimony of B. C. Lillis.)

actual fall of water level, which is the proper way of determining the grade, any back-water effect is taken care of when you take that difference in elevation.

Cross Examination:

(By Mr. Maury).

Q. Back-water at the county bridge is where you got an estimate of 46,000 cubic feet going by the county bridge?

A. I didn't quote 46,000 as the quantity going by, Mr. Maury. I said the conditions were such that you couldn't rely on those figures.

Q. But you did get an answer to certain calculations by Kutter's formula, showing that 46,000 was going by, but you didn't believe that was correct?

A. I wouldn't call that my answer, because I didn't take out the area of obstructions in that section.

Q. Where did you get the figures 46,000 cubic feet per second by this cross section here, by the county bridge? Where did you get that?

A. That would be the theoretical answer, ignoring the area of those obstructions along those buildings. But I didn't publish that figure and didn't take it as a fact, and did not take out the area of those buildings. But that was the theoretical answer by Kutter's formula, of water going by on June 7, 1929.

(Testimony of B. C. Lillis.)

Redirect Examination:

My position is, as you understand it, that I could not take the cross section at First Avenue without taking into consideration and going to considerable computation,—without considering the area of the buildings. There are no buildings [604] immediately to the south of the railroad bridge.

Recross Examination:

There are no buildings immediately to the south of the viaduct until you get to the edge of the right-of-way there, the south side of Orgain Street.

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DEFENDANT RESTS.

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MOTION.

Mr. HALL: Comes now the defendant at the close of all the evidence and moves the Court for an order directing a verdict in favor of the defendant upon the following grounds:

1. That the plaintiff has failed to prove by any substantial evidence, any of the acts of negligence charged against the defendant.
2. That the evidence shows without any substantial conflict, that the damage sustained by the plaintiff was caused by an unusual, excessive and extraordinary rain and flood which the defend-



ant could not have reasonably anticipated by the exercise of ordinary care and foresight.

3. That the plaintiff has failed to prove any negligence of the defendant in the construction and maintenance of said embankment and openings therein, as they existed on June 7, 1929.

4. That the evidence shows without any substantial conflict, that the bridge and bridges as constructed and maintained by the defendant from 1881 up to June 7, 1929, never caused any damage to said plaintiff, or to the property that was occupied by said plaintiff on June 7, 1929.

5. On the further ground, that even if there was negligence on the part of the defendant in obstructing the ordinary flow of water in said stream during ordinary high water, that the evidence shows that such negligence was merely general negligence, and [605] did not cause any damage to plaintiff at any time.

6. Upon the further ground, that the evidence shows that there was no actual negligence on the part of the defendant against said plaintiff.

7. That the evidence shows that water would have reached and flown through the plaintiff's property and damaged same to some extent, if there had been no railroad grade or embankment, and that plaintiff has wholly failed to show what damages, if any, he has sustained over and above the damage he would have sustained by the water that flowed through his building, irrespective of the existence of the railroad bridge and embankment.

The COURT: I think I will have to deny the motion, Mr. Hall.

Mr. HALL: All right; note our exception. [606]

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The cause was thereupon argued to the jury by counsel for the respective parties and thereafter, the Court instructed the jury as follows:

### CHARGE TO THE JURY

Gentlemen of the Jury, you have heard the evidence in the case and the arguments of counsel. It now becomes necessary for the Court to deliver the instructions, otherwise called the Charge to the Jury. This relates more especially to the law of the case than the facts, although sometimes the Judge comments on the facts and whenever he does so, he must inform the Jury that they are the sole judges of the facts of the case and that they have a right to disregard any comments that might have been made by the Court, if they see fit to do so.

As you have observed, the counsel for the respective parties have pretty thoroughly covered the facts; they have argued nearly all, we should say, of the important features of the case in an able manner; their respective theories have been presented here at this trial for several days. You have been patient and the Court has observed that you have given careful attention to the evidence—as trying and tedious as it may have seemed to you in many parts. You are to be congratulated in that respect for the consideration you have apparently

given all the details of the evidence presented to you here upon the trial of this case.

As I said before, you are the judges of the facts, the credibility of witnesses, and the weight to be given to the testimony in the case. The Court gives you the rules of law that you are to apply in interpreting the testimony and you accept those rules of law, no matter what individual opinion a juror might have as to what the law might be or should be, it is your duty to accept the rules of law given you by the Court, as the Judge accepts your judgment as to the facts represented by your verdict. That is probably a very proper arrangement. Congress in its wisdom, saw [607] fit to entrust the Court with those duties—to deliver to the Jury the rules of the law, and to apply the facts to a given case. If the Jury were permitted as it has been in some courts, to resolve both the law and the facts, it might result in some confusion and certainly in great difficulty, because we find that it is somewhat difficult for the Jury to agree on the facts or to agree on a verdict.

Now, at the beginning of the trial, counsel called your attention to the pleadings in the case. That was several days ago; and it is proper and fitting now that at this time, your attention should again be called to the pleadings in the case. As you know, this is an action of a civil nature. Heretofore, we have had to do with criminal cases—where proof must be made beyond a reasonable doubt. In a case of this nature proof must be made by a preponderance of the evidence; that may be explained to you.



The issues in this case—a civil case—are made up by the filing of a complaint on the part of the plaintiff, of an answer on the part of the defendant and of a reply on the part of the plaintiff, dealing with any new matters set up in the answer.

Now, to begin with the pleadings. As you know, the title of the case is “Nick Wagner, plaintiff, vs. Northern Pacific Railway Company, a corporation, M. L. Hare and John Presthus, defendants.” The last two defendants have been eliminated from the case. (reading complaint) This is a statement of the substance of paragraph I of the complaint, which is admitted by paragraph I of the answer itself, which states 342 square miles instead of 720. (reading par. II). Paragraph II of the answer admits the substance of par. II of the complaint, but alleges that the railroad had so crossed the valley on this embankment, and so forth. Par. III of the complaint relates to the defendants Hare and Presthus, heretofore referred to as having been dismissed. (Reading par. IV of [608] complaint). This par. IV is denied by the defendant. (Reading par. V). This paragraph is also denied by the defendant railway company. (Reading par. VI). This paragraph is also denied by the defendant railway company. (Was there an amendment made to the complaint known as par. VI½? Mr. Maury: Yes, sir; I believe at one of the early trials the amendment was made). Well, that accounts for the denial appearing in the answer, of par. VI½, so we will disregard that; that is not before us. (Par. VII): (reading). That paragraph is also denied by the defendant railway company.

The defendant then, in its answer: (reading paragraphs I, II, III, IV, V, VI, VII) (Mr. Hall: That I have amended, if the Court please, to "about 8:00 or 9:00 o'clock". Mr. Maury: Which is it, 8:00 or 9:00? The Court: Well, say "8:00 or 9:00 o'clock, on June 7, 1929"). There are two other separate defenses set forth in here which the Jury will disregard; they are not to be considered by you as a part of the case.

The reply of the plaintiff to this answer is as follows: (reading reply). That part of the reply as relates to the second and third defenses is to be disregarded by you; that has been excluded from the case.

Gentlemen, as to the rules of law that you are to consider in connection with the evidence:

You are instructed that in civil cases the affirmative of the issues must be proved, and that when the evidence is contradictory the decision must be made according to the preponderance of the evidence; and that in this case it devolves upon the plaintiff to prove his claim by a preponderance of the evidence, and likewise, upon the defendant to prove the affirmative allegations of its answer by a preponderance of the evidence.

By preponderance of the evidence is meant the greater weight. The preponderance of the evidence in a case is not alone determined by the number of witnesses testifying to a particular [609] fact or state of facts. In determining upon which side the preponderance of evidence it, the jury should take



into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest (if any) in the result of the suit; the probability or improbability of the truth of their several statements, in view of all of the other evidence, facts and circumstances proved on the trial; and from all these circumstances determine upon which side is the weight or preponderance of the evidence.

If you believe that any witness who has testified in this case, has knowingly and wilfully testified falsely concerning any matter or fact material to the elements of the cause of action charged herein, as defined in these instructions, his or her testimony is to be distrusted by you as to all other matters to which he or she testified.

You may not arbitrarily and capriciously disregard testimony of a witness who is not impeached in any of the usual modes known to the law, but whose testimony is reasonable and consistent with all the circumstances proved, bearing upon the material issues involved in this case.

The usual modes of impeachment of a witness, known to the law, as mentioned in the preceding instructions are:

1. By proving contradictory statements previously made by the witness as to matters relevant to his testimony in the case;
2. By disproving facts testified to by him, and
3. By evidence as to his general bad character.

But whether a witness has been impeached is solely for the jury to determine from all the evidence in the case.



The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact in this case.

A witness entitled to full credit is one whose statements [610] upon the witness stand are within reason and believable.

You gentlemen, as I stated before, are the sole judges of the effect, value and weight of the evidence in this case, and of the credibility of the witnesses. It is solely and exclusively your duty to determine the facts, and this you must do from the evidence presented to you and then apply the law as given you in these instructions to the facts as you find them.

Every witness who has testified in this case is presumed to have spoken the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony or by contradictory evidence.

In determining the credibility of any witness you are to take into account in weighing his testimony, his interest or want of interest in the result of the case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want of candor, his intelligence or lack of intelligence, his means of knowledge as to any fact about which he testified, his apparent fairness or lack of fairness, and whether he is supported or contradicted by the facts and circumstances in the case as shown by the evidence.

In determining what are the facts in this case you are not bound to decide in conformity with the statements of any number of witnesses not producing conviction in your minds against a less number, or against other evidence satisfying your minds, or against a presumption created by law.

You are instructed, as a matter of law, that in considering and determining the question whether the defendant was guilty of negligence in doing or failing to do any of the acts alleged in the complaint to have been negligently done or omitted that the burden of proof is upon the plaintiff to prove, by a preponderance of the evidence, which means by a greater weight of the evidence, not only that such act or acts or omissions were negligently done or [611] omitted, but also that such plaintiff's damage was caused by the act or acts of negligence charged and not due to some other cause.

Your conclusions must be based upon facts shown by the evidence and not upon inferences, which may be based upon inference, or presumptions, which may be based upon presumptions. Nor must your conclusions be based upon conjecture, surmise or speculation, however, shrewd or ingenious such conjectures, surmises or speculations may be.

If the evidence is evenly balanced, or if you are in doubt therefrom as to whether the damage the plaintiff sustained was due to any of the acts of negligence charged, or to some other cause, then your verdict should be for the defendant, and against such plaintiff.

Before the plaintiff herein can recover against the defendant, such plaintiff must prove that a proximate cause of the damage to plaintiff's property was the negligence of the defendant; it must appear from the evidence that the damage was the natural and probable consequences of the negligence of the defendant; and that some damage ought to have been foreseen by the defendant in the light of the attending circumstances. The first requisite of a proximate cause is the doing or omitting to do an act, which a man of ordinary prudence could foresee might naturally and probably produce damage; and the second requisite is that such act or omission did actually cause the damage.

If, therefore, you find from a preponderance of the evidence that, in constructing said embankment and openings therein, as they existed at the time of this flood, the negligence, if any, of the defendant, was not a proximate cause of the damage to the plaintiff herein, as that term is defined herein, or if you find that the property of such plaintiff would have been damaged had said embankment and openings therein never existed, then the construction of said embankment and openings, as the evidence shows [612] the same existed at the time of this flood, was not a proximate cause of the damage to plaintiff's property, and the defendant cannot be held for such damage.

The defendant, as a defense to this action, has alleged that the damage to plaintiff's property was the result of an unusual, excessive and extraordinary



rain and flood, which, by the exercise of reasonable foresight and prudence on its part, could not have been anticipated or prevented. When damage is the result of such a cause, it is commonly known in law as one caused by "an act of God", and by the term "Act of God", is meant those events and accidents which proceed from natural causes which cannot be reasonably anticipated or guarded against, such as unusual, excessive and extraordinary rains, freshets, floods, earthquakes, severe winds, cyclones, lightning and such like. For damages occurring solely by any of such causes, there is no liability and the party sustaining injury thereby cannot recover therefor.

In order for a rain, flood, wind, storm, or the like, to be classed as an act of God, it is not necessary to prove that it was the worst or most severe that ever occurred in that locality. It is sufficient to constitute it an act of God, if it is shown that it was such an unusual, excessive and extraordinary rain, flood, storm, or wind that, in the usual and customary conduct of a business in a reasonably prudent manner, it could not have been reasonably anticipated or guarded against.

If you believe from the evidence that the Railway Company, in raising the embankment of its railroad grade and constructing its bridge across Beaver Creek in 1898, employed civil engineers of at least ordinary skill and ability, and that it constructed, and thereafter maintained, the embankment and openings in question in accordance with the usage

of ordinarily prudent and careful engineers under like circumstances, and so as to reasonably handle and care for such ordinary recurring floods or [613] rises in Beaver Creek as were then known and as could be reasonably anticipated by the exercise of ordinary foresight and prudence, and that said openings did handle, in a reasonable manner, all flood waters prior to June 7, 1929, and that the flood of June 7, 1929, was an unusual, excessive and extraordinary flood, which could not have been reasonably anticipated, then the defendant was not guilty of negligence; but the damage to plaintiff was the result of such extraordinary flood or act of God and your verdict should be for the defendant.

Evidence has been introduced showing that after the flood of June 7, 1929, the defendant constructed a new bridge over Beaver Creek, which is longer than the bridge that existed there on June 7, 1929.

You are instructed that such evidence was not admitted for the purpose of showing negligence in the construction of the bridge that was there in June, 1929, and cannot be considered by you for such purpose.

The negligence, if any, of the defendant depends upon what it did and knew before June 7, 1929, and such negligence, if any, must be established by facts and circumstances which preceded that date and not by acts done thereafter in repairing or rebuilding the bridge.

A water course or stream is the channel cut by running water with well defined banks and bottom

through which water flows for substantial periods of each year.

In constructing a railway bridge, the law does not require that the full width of such channel be left open but only that the water course be restored to its original state of usefulness, as near as may be. The phrase "as near as may be", as used in this law, does not mean "as near as might be possible." It contemplates some variation from the original condition of the stream and allows some discretion in the engineers of the railway [614] company in constructing a bridge to make such reasonable changes in the flow of the water therein as they find necessary in constructing a safe and practical bridge over the stream.

Even if you find from the evidence that the channel was somewhat narrowed by the bridge, as constructed in 1896 and raised in 1898, but also find that the channel was then, or thereafter, straightened and deepened, so that it still carried off all the water which could have been reasonably anticipated by the exercise of ordinary foresight and prudence, including the ordinary flood waters, without any more interference with the flow thereof, than was reasonably consistent with the right granted the railway company to construct a safe and practical bridge over such stream, then you are instructed that there was no unlawful interference with the water course or channel of the stream by the defendant, and that it cannot be held guilty of negligence in the construction and maintenance of such bridge over the stream as it existed prior to June 7th, 1929.



If you find that the openings in said embankment were large enough to handle, in a reasonable manner, the flood waters of Beaver Creek, prior to June 7, 1929, and that they did not impair the usefulness of the stream to a greater extent than was reasonably necessary in order to construct a safe and practical bridge, and further find that the flood on June 7, 1929, was an unusual, excessive and extraordinary flood, which could not have been reasonably anticipated by the exercise of ordinary foresight and prudence, then you are instructed that the fact, if you find it is a fact, that the openings in the embankment as they existed on June 7, 1929, were not large enough to properly carry off the water in Beaver Creek on that date, would not render the defendant liable for damages resulting from such impounded water.

If you believe from the evidence that plaintiff's property was damaged by the flood waters of Beaver Creek on June 7, [615] 1929, and that damages thereto would have been sustained by plaintiff, in whole or in part, irrespective of the presence or condition of the railway embankment and openings therein, then the plaintiff cannot recover for such damages as you find would have been sustained regardless of the existence of such embankments and openings.

The defendant can only be held liable for such damages as the plaintiff proves, by a preponderance of the evidence, was caused by the negligence of the defendant and which negligence was a proximate cause of such damage.

The defendant can only be held liable for damages due to its negligence and in no event can be held liable for any damage that you believe plaintiff would have sustained had there been no embankment or bridge there at all.

If you believe from the evidence that the property of plaintiff would have been flooded to some extent and partially damaged by the flood waters of Beaver Creek on June 7, 1929, even if no railway embankment or bridges had existed there at all on that date, then the burden of proof is upon the plaintiff to prove the amount of damages, if any, sustained by flood water, if any, in excess of the water that would have gotten into their premises had there been no railway embankment and bridges.

And if the evidence is such that you are not able to reasonably determine therefrom what damage, if any, the plaintiff sustained by reason of water, if any, in excess of what you believe would have gotten into their property had there been no railway embankment and bridges at all, then you are instructed that plaintiff has failed to prove such damages and your verdict should be for the defendant.

In the event you should find a verdict in favor of the plaintiff, it will then become necessary for you to determine the amount of damages, if any, sustained by the plaintiff, by reason of [616] the existence of said embankment and openings therein, but not to include in your verdict damages, if any, which you believe plaintiff may have sustained in-

dependent of such cause, as is elsewhere explained in these instructions.

The burden of proof is upon the plaintiff to prove the damages, if any, alleged to have been sustained by reason of the alleged negligence of the defendant.

The plaintiff alleges that he owned a stock of men's and boys' clothing, cloths, rubber goods and haberdashery, situate in the building at the north-east corner of Wibaux Street and First Avenue South, of the value of more than Eighteen Thousand (\$18,000) Dollars, and that the same was soaked, damaged and impaired in value to the amount of \$15,000.00.

In this connection, you are instructed that the damage, if any, for loss of business cannot be recovered if the evidence shows the profits therefrom were speculative, contingent or uncertain; the plaintiff is only entitled to recover for loss of business, such profits as could reasonably have been earned, after deducting all proper and necessary expenses for carrying on the business during such period. Such profits, if any, are to be determined by the jury from all the facts and circumstances in the case.

The damages for alleged expenses paid for material and labor for cleaning the building, walls, etc., after the flood, would be a reasonable sum for such material and work which may or may not be the amount actually paid therefor. The reasonable amount of such material and work, regardless of



what was paid therefor, is to be determined by the jury from all the facts and circumstances in the case.

The damage to the machinery, furniture, fixtures, merchandise and other items mentioned above would be the difference between the market value or reasonable value thereof immediately [617] before the flood and the reasonable value after the flood was over.

In determining the reasonable value, you are not bound to accept, as conclusive, the opinion of witnesses, if any, giving their estimates of the value, but you may use your own judgment therein, based upon all the facts and circumstances in the case.

The plaintiff has asked for interest at the rate of eight per cent. per annum from June 8th, 1929, on the amount of any damages which you may find he has sustained by reason of the alleged negligence of the defendant.

You are instructed, as a matter of law, that the plaintiff is not entitled to interest as a matter of right, but whether or not interest should be allowed on such damages, if any, and for what period of time, is a matter resting wholly in your discretion.

Hence, if you find for the plaintiff, it rests with you to say whether he should also have interest or not, and if you decide that interest should not be allowed, you will make no mention thereof in your verdict, but if you decide to also award interest, then you should compute the same and insert the amount thereof in your verdict, as a separate item from the damages found.

Interest, if allowed, may be computed at the rate of eight per cent. per annum prior to March 15, 1933, and at the rate of six per cent. per annum since that date.

I charge you that the law recognizes but one degree of care, and that is called ordinary care. But ordinary care varies with and is proportionate to, and measured by the danger of the surrounding circumstances. What might be ordinary care in handling a force or situation or set of circumstances involving little danger to the lives or safety of others, might be negligence in handling the force or power or set of circumstances, of imminent danger to the lives and safety of others. As the danger increases, the degree of care required by the law increases.

Every railroad corporation has power to construct a road [618] across or along or upon any stream of water or water course in such manner as to secure life and property. But the corporation shall restore the stream or water course intersected, to its former state of usefulness as near as may be, and so that the railroad shall not unnecessarily impair its usefulness. When the railroad acts under such permission, it is in duty bound to restore the stream to its original usefulness as near as may be, either for drainage of nearby property or for irrigation.

The burden of proof is upon the defendant railway company to show by a preponderance of,—that is, a greater weight of the evidence, that there

was an act of God, as defined in these instructions, and if the evidence is evenly balanced on that issue, or if it preponderates in favor of Wagner, the plaintiff, you will find that issue in favor of Wagner and against the railway company.

Even if you believe from the evidence that the railroad company in constructing its bridge across Beaver Creek in 1896 and 1898, employed engineers of ordinary skill and ability, and even if the railroad then used reasonable care and skill in the construction of the bridge, yet if you find from the evidence that the opening at the bridge thereafter had been substantially narrowed so that it would not reasonably handle all of the ordinary flood waters, or if subsequent experience proved that whatever opening there was for water was not sufficient to carry away waters which would be reasonably anticipated, then suitable provision should have been made to permit such waters to flow unobstructed, within a reasonable time after discovery that the opening or openings were insufficient.

If you find from a preponderance of the evidence that Wagner suffered damage in the flood of June 7, 1929, at Wibaux, and that there were two causes which combined to produce the damage, and that both of said causes were proximate causes, as defined [619] elsewhere in the charge of the Court; and that one of such causes was one or more of the culpable negligent acts of the railway company set out in the complaint, and that the other of said causes was an act of God, then by your verdict, you



should hold the railway company liable for the loss resulting from both such concurring causes, provided you should further find that the loss would not have been sustained by Wagner but for some culpable negligent act of the railway, alleged in the complaint.

Testimony has been given by certain witnesses who, in law, are termed experts, and in this connection you are advised that, while in cases such as the one being tried, the law receives the evidence of men, expert in certain lines, as to their opinions derived from their knowledge of particular matters, the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which requires you to surrender your own judgment based upon credible evidence to that of any person testifying as an expert witness; in other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to.

The value of such testimony depends upon the circumstances of each case, and of these circumstances the jury must be the judges. When expert witnesses testify to matters of fact, from personal knowledge, then their testimony as to such facts within their personal knowledge should be considered the same as that of any other witnesses who testify from personal knowledge.

As to the answers of experts to hypothetical questions, you are advised that the weight to be

given to such answers must in the first place, depend upon the truthfulness of the facts assumed, and the party calling a witness, so testifying, must establish the premises included in the hypothetical question by a preponderance of the evidence. [620]

In determining what are the facts in this case and what verdict, if any, you should return, you will take into consideration only the testimony of the witnesses upon the witness stand in this case and such documentary evidence and exhibits as have been admitted.

You must not allow yourselves to consider or be in any manner influenced by anything which you may have seen, heard or read outside of the evidence and exhibits in this case.

Your verdict must be based solely upon the evidence and instructions of the Court presented and read to you in the course of the trial.

By no remark by the Court during the trial, nor by these instructions or otherwise, does the Court or did the Court express any opinion as to the facts in the case. It is for you and not the Court to determine what the facts are.

You should not give any weight to statements of counsel heretofore made to you, which are not supported by the evidence presented to you and by the instructions of the Court. Counsel are, however, privileged to argue and comment upon the law as given you in these instructions, in their arguments to you.

It is your duty to weigh all the evidence, and reconcile it, if possible; but if you find serious conflict in the evidence, then you should take the evidence which you consider worthy of credit, and give it such weight, under the rules of law submitted to you by the Court, as you believe it is entitled to receive.

It takes twelve of your number, concurring, to agree upon any verdict which you may return in this case.

When you retire to your jury room, you should select one of your number as Foreman, and he will sign your verdict, in the event you arrive at a verdict.

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Mr. MAURY: Plaintiff has no objections and no exceptions. [621]

Mr. McCARTHY: The defendant excepts to that portion of the charge beginning: "If you find from a preponderance of the evidence":—

"If you find from a preponderance of the evidence that Wagner suffered damage in the flood of June 7, 1929, at Wibaux, and that there were two causes which combined to produce the damage, and that both of said causes were proximate causes, as defined elsewhere in the charge of the Court; and that one of such causes was one or more of the culpable negligent acts of the railway company set out in the complaint, and that the other of said causes was an act of God, then by your verdict, you



should hold the railway company liable for the loss resulting from both such concurring causes, provided you should further find that the loss would not have been sustained by Wagner but for some culpable negligent act of the railway, alleged in the complaint.”

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My reason for excepting is the use of the words, largely, “culpable negligence”, it being our contention that there is no evidence whatever in the case to support the submission of any question of culpable negligence on the part of the defendant, and we except to the Court submitting the issue at all to the jury on the theory it is conceded by all the evidence in the case, particularly by the plaintiff himself, that some water would have reached the Wagner store even if there were no railroad bridge or embankment, and therefore, to permit the jury to pass on the question of damages would be permitting the jury to enter the field of conjecture and speculation.

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Thereupon, the jury retired to deliberate and thereafter, and on the 5th day of April, 1934, returned into Court with its verdict, in words and figures as follows, to-wit: [622]

[Title of Court and Cause.]

### VERDICT

We, the jury in the above entitled case, find our verdict in favor of Nick Wagner, and against the

railway company, defendant, and we assess Wagner's damages at the sum of 5000.00 Five Thousand Dollars.

JOSEPH G. PARKER

Foreman of the Jury.

(Filed April 5, 1935)

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On April 5, 1934, the court made the following order:

[Title of Court and Cause.]

"Thereupon, on motion of Mr. Jameson, defendant was granted 60 days in addition to the time allowed by rule, in which to prepare, and serve a bill of exceptions."

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Thereafter, pursuant to stipulation of parties filed in said cause, consenting to the granting of an extension of time to and including July 31, 1934, in which to prepare, serve and file defendant's bill of exceptions, the court, on June 4, 1934, made the following order:

[Title of Court and Cause.]

"Pursuant to stipulation of counsel filed in the above entitled cause, it is hereby ordered that the defendant may have to and including the 31st day of July, 1934, in which to prepare, serve and file a bill of exceptions in the above entitled cause."

The defendant now presents this, its Bill of Exceptions in the above entitled cause, and asks that the same be signed, settled and allowed as a true and correct Bill of Exceptions herein.

Dated: July 16, 1934.

FREDRICK D. McCARTHY  
JOHNSTON, COLEMAN & JAMESON,  
GUNN, RASCH & HALL,

Attorneys for Defendant.

Service of the foregoing Bill of Exceptions and the [623] receipt of a true copy thereof, is hereby acknowledged this 18 day of July, 1934.

T. C. COLTON

See first cases.

H. L. MAURY

Attorneys for Plaintiff

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The foregoing draft of the foregoing Bill of Exceptions taken at the trial of this cause, was delivered to the undersigned, Clerk of said Court, for the Judge of said Court, on the 31st day of July, 1934.

C. R. GARLOW

Clerk

By C. G. KEGEL

Deputy



CERTIFICATE SETTLING AND ALLOWING  
BILL OF EXCEPTIONS

It appearing that the foregoing Bill of Exceptions, consisting of 570 pages, numbered from one to five hundred seventy, inclusive, having been presented by the defendant, Northern Pacific Railway Company, a corporation, as its proposed Bill of Exceptions in the above entitled cause, and the foregoing having been made to truly represent all of the proceedings heretofore had in said cause, and the same being now a full, true and correct statement of all proceedings had therein, the same is hereby settled and allowed by the Judge of this Court and certified to as the Defendant's Bill of Exceptions taken at said cause and is hereby declared and certified to be a full, true and correct record of said cause and all of the matters and proceedings therein, including the testimony taken at the trial.

Dated this 2nd day of August 1934.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed: August 2, 1934. [624]

Thereafter, on May 14, 1934, Petition for New Trial was duly filed herein, in the words and figures following, to-wit: [625]

[Title of Court and Cause.]

PETITION FOR NEW TRIAL.

Now comes the defendant, by its counsel, and petitions the Court to set aside the verdict heretofore rendered herein and to grant defendant a new trial in this cause and for grounds of said petition presents and shows to the Court the following, to-wit:

I.

Insufficiency of the evidence to justify the verdict.

In this connection, your petitioner sets forth the following particulars wherein the evidence is claimed to be insufficient to sustain the verdict.

Plaintiff's action is based upon the allegation that the defendant constructed a railway embankment across the Beaver Creek valley and negligently failed to construct and maintain a bridge over the channel of Beaver Creek or openings in said embankment sufficient to permit the free flow of water "in ordinarily seasonally recurring high water" (paragraph 4 of complaint). The defendant denied all the allegations of negligence and alleged that the damage to plaintiff's property was due to an unusual, extraordinary and unprecedented flood which the defendant could not have reasonably anticipated. (Paragraph 6 of answer). [626]

(a) Upon the issues thus raised, the evidence is insufficient to establish or prove that the bridge over said creek was not sufficient to properly handle all ordinary recurring high water flowing in said stream prior to June 7, 1929, without causing any damage to plaintiff's property or to the property that was occupied by plaintiff on June 7, 1929. On the contrary, the evidence shows that the permanent bridge, as constructed in 1896 and raised five feet in 1898, and which remained there until June 7, 1929, did at all times handle all flood waters without causing any damage to the plaintiff's property or to the property that was occupied by him on June 7, 1929.

(b) The evidence is insufficient to prove that the defendant knew, or should have known, that a flood like that of June 7, 1929, might come down said stream and valley.

(c) The evidence is insufficient to prove that the defendant did not employ competent civil engineers of recognized ability to plan and construct the bridge over said stream, or that it was not constructed in accordance with the plans and specifications of such engineers. On the contrary, the evidence shows that the defendant did employ competent and skillful engineers and that the bridge was constructed in accordance with their plans.

(d) The evidence is insufficient to prove that the flood of June 7, 1929 was only an ordinary high water that might reasonably have been expected by the defendant. On the contrary, the evidence conclusively shows that the flood of June 7,



1929 was an unusual, extraordinary and unprecedented flood, which could not have been reasonably expected or anticipated by the defendant.

(e) The evidence is insufficient to prove that there was any negligence in the plan, construction or maintenance of the bridges over Beaver Creek as they existed from 1881 up to June 7, 1929.

(f) The evidence shows that the property of plaintiff would have been flooded to some extent had there been no railroad embankment across the valley and bridge over Beaver Creek, and the evidence is [627] insufficient to prove what additional damages, if any, plaintiff sustained by reason of the existence of such embankment and bridge.

(g) The evidence is insufficient to prove that the flood water of June 7, 1929 would not have overflowed the bank of the stream and caused the damage to the property of plaintiff before such water reached the railroad embankment and bridge over said creek.

(h) The evidence is insufficient to prove that the defendant, in constructing said bridge, did not restore the stream to its former state of usefulness, as near as may be, compatible with the construction of a safe and practical bridge for railroad operations.

(i) The evidence is insufficient to prove that the opening in the bridge over Beaver Creek, as it existed prior to June 7, 1929, was narrower than the channel of said stream at low water.

(j) The evidence is insufficient to prove any actionable negligence on the part of the defendant against the plaintiff.

(k) The evidence is insufficient to prove any of the acts of negligence charged in the complaint against the defendant.

## II.

Errors in law occurring at the trial, which are as follows, to-wit:

(a) The Court erred in over-ruling defendant's objections to the following questions propounded the witness O'Keefe:

"Q. Do you recall any incidents of people being rescued in the Davis Addition, in 1921?

A. Yes, sir.

Q. Who were some of those people and where were the houses? Point them out.

A. My sister was taken from the house where I live now, in 1921.

Mr. McCARTHY: I object to this line of testimony as incompetent, irrelevant and immaterial to any issue in this case. It appears now from the exhibit in evidence, that the water, in 1921, that got in the Davis Addition would necessarily come from the sidehills and the draws. The witness has told us that the water didn't get up in the town from the creek; therefore, it would have no question on the adequacy of the railroad bridge or not; it has nothing to do with the case.

Mr. MAURY: The range or the locality is the test. In that locality, it may be gone into to show notice,—35 miles in any direction— [628]

Mr. McCARTHY: The witness says the water of 1921 didn't get up in 1921 and do any damage.

It is possible that it got up in the Davis Addition. What bearing could it have on the——

The COURT: You gentlemen ought to know. You have been through this enough. It may have some bearing on it, and I will overrule the objection. Let it be shown briefly. I don't think we need to go into all the houses.

Mr. McCARTHY: Exception." (R.——)

(b) The Court erred in overruling defendant's objections to the following question propounded the witness Drake:

"Q. Do you recall further up the track about 3000 or 4000 feet to the east, what happened in 1921?

Mr. McCARTHY: Objected to as incompetent, irrelevant and immaterial,—outside of the drainage area of Beaver Creek—and not material to any issue in this case.

The COURT: I think I will overrule the objection.

Mr. McCARTHY: Exception.

Q. What, if anything, happened to the railway track about 3000 feet to the east of the depot?

Mr. McCARTHY: In order to save time, may we have the same objection, and the ruling, and exception?

Mr. MAURY: Yes; yes.

The COURT: Yes." (R.——)

(c) The Court erred in overruling defendant's objections to the following question propounded the witness Barclay:

"Q. Now, from there on east to your ranch house, what happened in 1921 to that railroad?



Mr. McCARTHY: Objected to as being immaterial, if the Court please, not having any bearing on Beaver Creek, or the bridge over Beaver Creek, as to what happened six miles east.

Mr. MAURY: We intend to show the intensity of the flood.

The COURT: I think so; overrule the objection.

Mr. McCARTHY: Exception." (R.——)

(d) The Court erred in overruling defendant's objections to the following question propounded the witness Lyman:

"Q. How does that correspond with the area for water to go through the old railroad bridge that existed there on June 7, 1929?

Mr. McCARTHY: That is objected to, if the Court please. If he wants to compare the area under the County bridge with the area under the railroad bridge, there is no objection. Now, he proposes to go outside of the County bridge, and taking in the possibility of an overflow and compare the possible overflow of the area of the County bridge with the area of the railroad bridge. If you will compare the area under the county bridge with the area under the railroad bridge, there is no objection. This is not a proper comparison [629]

The COURT: I don't know if that is his object altogether.

Mr. MAURY: No, sir; it is to show the provision that others made for water there.

The COURT: On account of the height of the roadway you mean, and the height of the bridge?

Mr. MAURY: Yes, sir,—the proof that in high water, the water flowed around the County bridge over that area.

The COURT: I will overrule the objection. You may show it.

Mr. McCARTHY: Note an exception."

(e) The Court erred in sustaining plaintiff's objection to the certified copy from the War Department of the Army Engineers report on the Beaver Creek situation, Defendant's Exhibit D-12, offered in connection with the cross-examination of the witness Lyman: (R.——).

(f) The Court erred in sustaining plaintiff's objection to the certified copy from the War Department of the Army Engineers report on Beaver Creek conditions, Defendant's Exhibit D-12, when offered on direct examination of Defendant's witness Lillis (R.——).

(g) The Court erred in overruling defendant's objection to the following question propounded to plaintiff's witness Lyman on rebuttal:

"Q. Mr. Lyman, having heard all of the testimony of the defendant's witnesses here as to the bridge, what is your opinion as to whether any water would have gotten into the building shown to have been occupied by Nick Wagner on June 6 and 7, 1929, if there had been a bridge with openings 115 feet at Beaver Creek by the Northern Pacific Railway?

Mr. HALL: We object to that question as asking this witness to determine a question that was submitted to the jury, and improper examination on

a question of issue that should be submitted to the jury.

The COURT: Oh, yes, your experts have testified to the adequacy of the opening. Overrule the objection. Let him answer the question, if he can.

(Question repeated):

A. I believe there would have been very little, if any.

Q. By "very little", how much? A. I am very doubtful whether there would have been any. I wouldn't say whether it would have hit the floor of that building, perhaps." (R.——).

(h) The Court erred in overruling defendant's motion at the close of all the evidence for an order directing the jury to return a verdict in favor of the defendant (R.——).

(i) The Court erred in giving the following instruction to the jury, to the giving of which the defendant duly excepted, to-wit:

"If you find from a preponderance of the evidence that Wagner suffered damage in the flood of June 7, 1929, at Wibaux, and that there were two causes which combined to produce the damage, and that both of said causes were proximate causes, as defined elsewhere in the charge of the Court; and that one of such causes was one or more of the culpable negligent acts of the rail- [630] way company set out in the complaint, and that the other of said causes was an act of God, then by your verdict, you should hold the railway company liable for the loss resulting from both such concurring causes, provided you should further find that the



loss would not have been sustained by Wagner but for some culpable negligent act of the railway, alleged in the complaint."

### III.

The verdict is contrary to the law as given to the jury and particularly in the following portions of the Court's instructions, to-wit:

"If you believe from the evidence that the Railway Company, in raising the embankment of its railroad grade and constructing its bridge across Beaver Creek in 1898, employed civil engineers of at least ordinary skill and ability, and that it constructed, and thereafter maintained, the embankment and openings in question in accordance with the usage of ordinarily prudent and careful engineers under like circumstances, and so as to reasonably handle and care for such ordinary recurring floods or rises in Beaver Creek as were then known and as could be reasonably anticipated by the exercise of ordinary foresight and prudence, and that said openings did handle, in a reasonable manner, all flood waters prior to June 7, 1929, and that the flood of June 7, 1929 was an unusual, excessive and extraordinary flood, which could not have been reasonably anticipated, then the defendant was not guilty of negligence; but the damage to plaintiff was the result of such extraordinary flood or act of God and your verdict should be for the defendant."

"A water course or stream is the channel cut by running water with well defined banks and bottom

thru which water flows for substantial periods of each year.

In constructing a railway bridge, the law does not require that the full width of such channel be left open but only that the water course be restored to its original state of usefulness, as near as may be. The phrase "as near as may be", as used in this law, does not mean "as near as might be possible". It contemplates some variation from the original condition of the stream and allows some discretion in the engineers of the railway company in constructing a bridge to make such reasonable changes in the flow of the water therein as they find necessary in constructing a safe and practical bridge over the stream.

Even if you find from the evidence that the channel was somewhat narrowed by the bridge, as constructed in 1896 and raised in 1898, but also find that the channel was then, or thereafter, straightened and deepened, so that it still carried off all the water which could have been reasonably anticipated by the exercise of ordinary foresight and prudence, including the ordinary flood waters, without any more interference with the flow thereof, than was reasonably consistent with the right granted the railway company to construct a safe and practical bridge over such stream, then you are instructed that there was no unlawful interference with the water course or channel of the stream by the defendant, and that it cannot be held guilty of negligence in the construction and maintenance



of such bridge over the stream as it existed prior to June 7th, 1929.” [631]

“If you find that the openings in said embankment were large enough to handle, in a reasonable manner, the flood waters of Beaver Creek, prior to June 7, 1929, and that they did not impair the usefulness of the stream to a greater extent than was reasonably necessary in order to construct a safe and practical bridge, and further find that the flood on June 7, 1929 was an unusual, excessive and extraordinary flood, which could not have been reasonably anticipated by the exercise of ordinary foresight and prudence, then you are instructed that the fact, if you find it is a fact, that the openings in the embankment as they existed on June 7, 1929, were not large enough to properly carry off the water in Beaver Creek on that date, would not render the defendant liable for damages resulting from such impounded water.”

“If you believe from the evidence that the property of plaintiff would have been flooded to some extent and partially damaged by the flood waters of Beaver Creek on June 7, 1929, even if no railway embankment or bridges had existed there at all on that date, then the burden of proof is upon the plaintiff to prove the amount of damages, if any, sustained by flood water, if any, in excess of the water that would have gotten into their premises had there been no railway embankment and bridges.

And if the evidence is such that you are not able to reasonably determine therefrom what damage, if any, the plaintiff sustained by reason of water, if any, in excess of what you believe would



thru which water flows for substantial periods of each year.

In constructing a railway bridge, the law does not require that the full width of such channel be left open but only that the water course be restored to its original state of usefulness, as near as may be. The phrase "as near as may be", as used in this law, does not mean "as near as might be possible". It contemplates some variation from the original condition of the stream and allows some discretion in the engineers of the railway company in constructing a bridge to make such reasonable changes in the flow of the water therein as they find necessary in constructing a safe and practical bridge over the stream.

Even if you find from the evidence that the channel was somewhat narrowed by the bridge, as constructed in 1896 and raised in 1898, but also find that the channel was then, or thereafter, straightened and deepened, so that it still carried off all the water which could have been reasonably anticipated by the exercise of ordinary foresight and prudence, including the ordinary flood waters, without any more interference with the flow thereof, than was reasonably consistent with the right granted the railway company to construct a safe and practical bridge over such stream, then you are instructed that there was no unlawful interference with the water course or channel of the stream by the defendant, and that it cannot be held guilty of negligence in the construction and maintenance

of such bridge over the stream as it existed prior to June 7th, 1929.” [631]

“If you find that the openings in said embankment were large enough to handle, in a reasonable manner, the flood waters of Beaver Creek, prior to June 7, 1929, and that they did not impair the usefulness of the stream to a greater extent than was reasonably necessary in order to construct a safe and practical bridge, and further find that the flood on June 7, 1929 was an unusual, excessive and extraordinary flood, which could not have been reasonably anticipated by the exercise of ordinary foresight and prudence, then you are instructed that the fact, if you find it is a fact, that the openings in the embankment as they existed on June 7, 1929, were not large enough to properly carry off the water in Beaver Creek on that date, would not render the defendant liable for damages resulting from such impounded water.”

“If you believe from the evidence that the property of plaintiff would have been flooded to some extent and partially damaged by the flood waters of Beaver Creek on June 7, 1929, even if no railway embankment or bridges had existed there at all on that date, then the burden of proof is upon the plaintiff to prove the amount of damages, if any, sustained by flood water, if any, in excess of the water that would have gotten into their premises had there been no railway embankment and bridges.

And if the evidence is such that you are not able to reasonably determine therefrom what damage, if any, the plaintiff sustained by reason of water, if any, in excess of what you believe would

have gotten into their property had there been no railway embankment and bridges at all, then you are instructed that plaintiff has failed to prove such damages and your verdict should be for the defendant.”

This petition for a new trial is made and based upon the pleadings and papers on file, and upon the minutes of the Court in said cause, including the testimony taken, instructions given and proceedings had at the trial, which proceedings will be embodied in a bill of exceptions to be settled and filed herein.

FREDERICK D. McCARTHY  
JOHNSTON, COLEMAN & JAMESON  
GUNN, RASCH & HALL

Attorneys for Defendant.

Due personal service of within Petition for New Trial made and admitted and receipt of copy acknowledged this 10th day of May 1934.

T. C. COLTON  
LOWNDES MAURY

Attorneys for Plaintiff.

[Endorsed]: Filed May 14, 1934. [632]

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Thereafter, on February 18, 1935, Order denying Motion for New Trial was duly entered herein, in the words and figures following, to-wit: [633]

[Title of Court and Cause.]

#### ORDER.

The petition for a new trial in the above entitled cause came on regularly for hearing, and



the court having considered the said petition and arguments of counsel for the respective parties, and being duly advised, and good cause appearing therefor, it is ordered that the said petition for a new trial be, and the same is, hereby denied.

CHARLES N. PRAY

Judge.

Dated Feb 18 1935

[Endorsed]: Filed Feb 18 1935. [634]

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Thereafter, on March 13, 1935, Bill of Exceptions No. 2, on the Order denying Motion for New Trial, was duly signed, settled, allowed and filed herein, being in the words and figures following, to-wit: [635]

[Title of Court and Cause.]

BILL OF EXCEPTIONS NO. 2

BE IT REMEMBERED that on April 14, 1934, judgment was duly made and entered in accordance with the verdict rendered in the above-entitled cause and that thereafter, and on the 14th day of May, 1934, the defendant made and filed in said Court its petition for a new trial of said cause, together with its assignment of errors, which said petition for new trial and assignment of errors, omitting the title of court and cause, is in words following:

“PETITION FOR NEW TRIAL.

Now comes the defendant, by its counsel, and petitions the Court to set aside the verdict heretofore rendered herein and to grant defendant a new trial in this cause and for grounds of said petition presents and shows to the Court the following, to-wit:

I.

Insufficiency of the evidence to justify the verdict.

In this connection, your petitioner sets forth the following particulars wherein the evidence is claimed to be insufficient to sustain the verdict.

Plaintiff's action is based upon the allegation that the defendant constructed a railway embankment across the Beaver Creek valley and negligently failed to construct and maintain a bridge over the channel of Beaver [636] Creek or openings in said embankment sufficient to permit the free flow of water “in ordinarily seasonally recurring high water” (paragraph 4 of complaint). The defendant denied all the allegations of negligence and alleged that the damage to plaintiff's property was due to an unusual, extraordinary and unprecedented flood which the defendant could not have reasonably anticipated. (Paragraph 6 of answer).

(a) Upon the issues thus raised, the evidence is insufficient to establish or prove that the bridge over said creek was not sufficient to properly handle all ordinary recurring high water flowing in said stream prior to June 7, 1929, without causing any

damage to plaintiff's property or to the property that was occupied by plaintiff on June 7, 1929. On the contrary, the evidence shows that the permanent bridge, as constructed in 1896 and raised five feet in 1898, and which remained there until June 7, 1929, did at all times handle all flood waters without causing any damage to the plaintiff's property or to the property that was occupied by him on June 7, 1929.

(b) The evidence is insufficient to prove that the defendant knew, or should have known, that a flood like that of June 7, 1929, might come down said stream and valley.

(c) The evidence is insufficient to prove that the defendant did not employ competent civil engineers of recognized ability to plan and construct the bridge over said stream, or that it was not constructed in accordance with the plans and specifications of such engineers. On the contrary, the evidence shows that the defendant did employ competent and skillful engineers and that the bridge was constructed in accordance with their plans.

(d) The evidence is insufficient to prove that the flood of June 7, 1929 was only an ordinary high water that might reasonably have been expected by the defendant. On the contrary, the evidence conclusively shows that the flood of June 7, 1929 was an unusual, extraordinary and unprecedented flood, which could not have been reasonably expected or anticipated by the defendant [637]

(e) The evidence is insufficient to prove that there was any negligence in the plan, construction



or maintenance of the bridges over Beaver Creek as they existed from 1881 up to June 7, 1929.

(f) The evidence shows that the property of plaintiff would have been flooded to some extent had there been no railroad embankment across the valley and bridge over Beaver Creek, and the evidence is insufficient to prove what additional damages, if any, plaintiff sustained by reason of the existence of such embankment and bridge.

(g) The evidence is insufficient to prove that the flood water of June 7, 1929 would not have overflowed the bank of the stream and caused the damage to the property of plaintiff before such water reached the railroad embankment and bridge over said creek.

(h) The evidence is insufficient to prove that the defendant, in constructing said bridge, did not restore the stream to its former state of usefulness, as near as may be, compatible with the construction of a safe and practical bridge for railroad operations.

(i) The evidence is insufficient to prove that the opening in the bridge over Beaver Creek, as it existed prior to June 7, 1929, was narrower than the channel of said stream at low water.

(j) The evidence is insufficient to prove any actionable negligence on the part of the defendant against the plaintiff.

(k) The evidence is insufficient to prove any of the acts of negligence charged in the complaint against the defendant.

II.

Errors in law occurring at the trial, which are as follows, to-wit:

(a) The Court erred in over-ruling defendant's objections to the following questions propounded the witness O'Keefe:

"Q. Do you recall any incidents of people being rescued in the Davis Addition, in 1921?

A. Yes, sir.

Q. Who were some of those people and where were the houses? Point them out.

A. My sister was taken from the house where I live now, in 1921.

Mr. McCARTHY: I object to this line of testimony as incompetent, irrelevant and immaterial to any issue in this case. It appears now from the exhibit in evidence, that the water, in 1921, that got in the Davis Addition would necessarily come from the sidehills and the draws. The witness has told us that the water [638] didn't get up in the town from the creek; therefore, it would have no question on the adequacy of the railroad bridge or not; it has nothing to do with the case.

Mr. MAURY: The range or the locality is the test. In that locality, it may be gone into to show notice,—35 miles in any direction——

Mr. McCARTHY: The witness says the water of 1921 didn't get up in 1921 and do any damage. It is possible that it got up in the Davis Addition. What bearing could it have on the——

The COURT: You gentlemen ought to know. You have been through this enough. It may have

some bearing on it, and I will overrule the objection. Let it be shown briefly. I don't think we need to go into all the houses.

Mr. McCARTHY: Exception." (R.——)

(b) The Court erred in overruling defendant's objections to the following question propounded the witness Drake:

"Q. Do you recall further up the track about 3000 or 4000 feet to the east, what happened in 1921?

Mr. McCARTHY: Objected to as incompetent, irrelevant and immaterial,—outside of the drainage area of Beaver Creek—and not material to any issue in this case.

The COURT: I think I will overrule the objection.

Mr. McCARTHY: Exception.

Q. What, if anything, happened to the railway track about 3000 feet to the east of the depot?

Mr. McCARTHY: In order to save time, may we have the same objection, and the ruling, and exception?

Mr. MAURY: Yes; yes.

The COURT: Yes." (R.——)

(c) The Court erred in overruling defendant's objections to the following question propounded the witness Barclay:

"Q. Now, from there on east to your ranch house, what happened in 1921 to that railroad?

Mr. McCARTHY: Objected to as being immaterial, if the Court please, not having any bearing on Beaver Creek, or the bridge over Beaver Creek, as to what happened six miles east.



Mr. MAURY: We intend to show the intensity of the flood.

The COURT: I think so; overrule the objection.

Mr. McCARTHY: Exception." (R.——)

(d) The Court erred in overruling defendant's objections to the following question propounded the witness Lyman:

"Q. How does that correspond with the area for water to go through the old railroad bridge that existed there on June 7, 1929?

Mr. McCARTHY: That is objected to, if the Court please. If he wants to compare the area under the County bridge with the area under the railroad bridge, there is no objection. Now, he proposes to go outside of the County bridge, and taking in the possibility of an overflow and compare the possible overflow of the area of the County bridge with the area of the railroad bridge. If you will compare the area under the county bridge with the area under the railroad [639] bridge, there is no objection. This is not a proper comparison.

The COURT: I don't know if that is his object altogether.

Mr. MAURY: No, sir; it is to show the provision that others made for water there.

The COURT: On account of the height of the roadway you mean, and the height of the bridge?

Mr. MAURY: Yes, sir,—the proof that in high water, the water flowed around the County bridge over that area.

The COURT: I will overrule the objection. You may show it.

Mr. McCARTHY: Note an exception."

(e) The Court erred in sustaining plaintiff's objection to the certified copy from the War Department of the Army Engineers report on the Beaver Creek situation, Defendant's Exhibit D-12, offered in connection with the cross-examination of the witness Lyman: (R.——).

(f) The Court erred in sustaining plaintiff's objection to the certified copy from the War Department of the Army Engineers report on Beaver Creek conditions, Defendant's Exhibit D-12, when offered on direct examination of Defendant's witness Lillis (R.——).

(g) The Court erred in overruling defendant's objection to the following question propounded to plaintiff's witness Lyman on rebuttal:

"Q. Mr. Lyman, having heard all of the testimony of the defendant's witnesses here as to the bridge, what is your opinion as to whether any water would have gotten into the building shown to have been occupied by Nick Wagner on June 6 and 7, 1929, if there had been a bridge with openings 115 feet at Beaver Creek by the Northern Pacific Railway?

Mr. HALL: We object to that question as asking this witness to determine a question that was submitted to the jury, and improper examination on a question of issue that should be submitted to the jury.

The COURT: Oh, yes, your experts have testified to the adequacy of the opening. Overrule the objection. Let him answer the question, if he can.

(Question repeated):

A. I believe there would have been very little, if any.

Q. By “very little”, how much? A. I am very doubtful whether there would have been any. I wouldn’t say whether it would have hit the floor of that building, perhaps.” (R.——).

(h) The Court erred in overruling defendant’s motion at the close of all the evidence for an order directing the jury to return a verdict in favor of the defendant (R.——).

(i) The Court erred in giving the following instruction to the jury, to the giving of which the defendant duly excepted, to-wit:

“If you find from a preponderance of the evidence that Wagner suffered damage in the flood of June 7, 1929, at Wibaux, and that there were two causes which combined to produce the damage, [640] and that both of said causes were proximate causes, as defined elsewhere in the charge of the Court; and that one of such causes was one or more of the culpable negligent acts of the railway company set out in the complaint, and that the other of said causes was an act of God, then by your verdict, you should hold the railway company liable for the loss resulting from both such concurring causes, provided you should further find that the loss would not have been sustained by Wagner



but for some culpable negligent act of the railway, alleged in the complaint.”

### III.

The verdict is contrary to the law as given to the jury and particularly in the following portions of the Court's instructions, to-wit:

“If you believe from the evidence that the Railway Company, in raising the embankment of its railroad grade and constructing its bridge across Beaver Creek in 1898, employed civil engineers of at least ordinary skill and ability, and that it constructed, and thereafter maintained, the embankment and openings in question in accordance with the usage of ordinarily prudent and careful engineers under like circumstances, and so as to reasonably handle and care for such ordinary recurring floods or rises in Beaver Creek as were then known and as could be reasonably anticipated by the exercise of ordinary foresight and prudence, and that said openings did handle, in a reasonable manner, all flood waters prior to June 7, 1929, and that the flood of June 7, 1929 was an unusual, excessive and extraordinary flood, which could not have been reasonably anticipated, then the defendant was not guilty of negligence; but the damage to plaintiff was the result of such extraordinary flood or act of God and your verdict should be for the defendant.”

“A water course or stream is the channel cut by running water with well defined banks and bottom thru which water flows for substantial periods of each year.

In constructing a railway bridge, the law does not require that the full width of such channel be left open but only that the water course be restored to its original state of usefulness, as near as may be. The phrase "as near as may be", as used in this law, does not mean "as near as might be possible". It contemplates some variation from the original condition of the stream and allows some discretion in the engineers of the railway company in constructing a bridge to make such reasonable changes in the flow of the water therein as they find necessary in constructing a safe and practical bridge over the stream.

Even if you find from the evidence that the channel was somewhat narrowed by the bridge, as constructed in 1896 and raised in 1898, but also find that the channel was then, or thereafter, straightened and deepened, so that it still carried off all the water which could have been reasonably anticipated by the exercise of ordinary foresight and prudence, including the ordinary flood waters, without any more interference with the flow thereof, than was reasonably consistent with the right granted the railway company to construct a safe and practical bridge over such stream, then you are instructed that there was no unlawful interference with the water course or channel of the stream by the defendant, and that it cannot be held guilty of negligence in the construction and maintenance of such bridge over the stream as it existed prior to June 7th, 1929."

“If you find that the openings in said embankment were large enough to handle, in a reasonable manner, the flood waters of Beaver Creek, prior to June 7, 1929, and that they did not impair [641] the usefulness of the stream to a greater extent than was reasonably necessary in order to construct a safe and practical bridge, and further find that the flood on June 7, 1929 was an unusual, excessive and extraordinary flood, which could not have been reasonably anticipated by the exercise of ordinary foresight and prudence, then you are instructed that the fact, if you find it is a fact, that the openings in the embankment as they existed on June 7, 1929, were not large enough to properly carry off the water in Beaver Creek on that date, would not render the defendant liable for damages resulting from such impounded water.”

“If you believe from the evidence that the property of plaintiff would have been flooded to some extent and partially damaged by the flood waters of Beaver Creek on June 7, 1929, even if no railway embankment or bridges had existed there at all on that date, then the burden of proof is upon the plaintiff to prove the amount of damages, if any, sustained by flood water, if any, in excess of the water that would have gotten into their premises had there been no railway embankment and bridges.

And if the evidence is such that you are not able to reasonably determine therefrom what damage, if any, the plaintiff sustained by reason of water, if any, in excess of what you believe would have gotten into their property had there been no



railway embankment and bridges at all, then you are instructed that plaintiff has failed to prove such damages and your verdict should be for the defendant.”

This petition for a new trial is made and based upon the pleadings and papers on file, and upon the minutes of the Court in said cause, including the testimony taken, instructions given and proceedings had at the trial, which proceedings will be embodied in a bill of exceptions to be settled and filed herein.

FREDERIC D. McCARTHY

JOHNSTON, COLEMAN & JAMESON

GUNN, RASCH & HALL

Attorneys for Defendant.

[Endorsed]: Filed May 14, 1934.”

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BE IT FURTHER REMEMBERED that thereafter said petition for a new trial was regularly submitted to said Court on August 4th, 1934, for its decision and determination and thereafter, and on the 18th day of February, 1935, the Court made and entered its order denying said petition, which order, omitting title of court and cause, reads as follows: [642]

“ORDER

The petition for a new trial in the above entitled cause came on regularly for hearing, and the court having considered the said petition and arguments of counsel for the respective parties, and being duly advised, and good cause appearing therefor,

it is ordered that the said petition for a new trial be, and the same is, hereby denied.

CHARLES N. PRAY

Judge.

Dated Feb. 18, 1935.”

And now comes the defendant, and within ten (10) days after the making and entering of said order denying defendant’s petition for a new trial, and submits this, its proposed bill of exceptions and asks that the same be signed, settled and allowed as a true and correct bill of exceptions herein.

Dated this 25th day of February, 1935.

FREDERIC D. McCARTHY

JOHNSTON, COLEMAN & JAMESON

GUNN, RASCH & HALL

Attorneys for Defendant.

State of Montana

County of Lewis and Clark—ss.

E. M. HALL, being first duly sworn, says: That he is one of the attorneys for the defendant in the above-entitled cause; that the attorneys for said defendant reside and have their offices in Helena, Montana, and St. Paul, Minnesota; that Thomas C. Colton, one of the attorneys of record for the plaintiff in said action, resides and has his office in the town of Wibaux, Montana, and H. L. Maury, the other attorney of record for the plaintiff in said action, resides and has his office in the city of Butte, Montana; that between the town of Wibaux and the city of Helena, there is a regular communication by mail; that affiant served the foregoing pro-

posed bill of exceptions upon said Thomas C. Colton, one of the attorneys of record for plaintiff, by depositing a letter containing a copy thereof in the Post Office at Helena, Montana, on February 25, 1935, [643] addressed to said Thomas C. Colton, Attorney at Law, Wibaux, Montana, with the necessary postage thereon to carry said letter prepaid.

E. M. HALL

Subscribed and sworn to before me this 25th day of February, 1935.

[Notarial Seal]                      A. A. MAJOR

Notary Public for the State of Montana  
Residing at Helena, Montana.

My commission expires Feb. 28th, 1937. [644]

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CERTIFICATE.

The undersigned Judge, who tried the above entitled action, hereby certifies that the above and foregoing is a full, true and correct bill of exceptions in said action and contains all of the evidence introduced, proceedings had, and the exceptions taken in the trial of said action to the extent therein set forth; and,

IT IS ORDERED, and this does order that the above and foregoing be approved, allowed and settled as a true and correct bill of exceptions herein, within the judgment term or as extended.

Dated this 13th day of March, A. D. 1935.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed March 13, 1935. [645]



Thereafter, on April 25, 1935, Application for an Order reviving and continuing the case in the name of Olivia Wagner, as Administratrix, etc., was duly filed herein, in the words and figures following, to-wit: [646]

[Title of Court and Cause.]

APPLICATION FOR AN ORDER REVIVING  
AND CONTINUING THE ABOVE CASE  
IN THE NAME OF LEGAL REPRESENTATIVE OF PLAINTIFF.

Comes now the defendant in the above-entitled action, by and through E. M. Hall, one of its Division Counsel for the State of Montana, and applies to the Court for an order reviving and continuing the above-entitled action by and in the name of Olivia Wagner, as Administratrix with the Will annexed of the estate of Nick Wagner, deceased.

This ex parte application is based upon Rule 94 of the Rules of this Court, the affidavit of E. M. Hall hereto attached, and the attached copy of letters of administration, with the Will annexed, issued to Olivia Wagner on April 20th, 1935.

NORTHERN PACIFIC RAILWAY  
COMPANY,

By E. M. HALL

One of its Division Counsel. [647]

[Title of Court and Cause.]

AFFIDAVIT.

State of Montana

County of Lewis and Clark—ss.

E. M. HALL, being first duly sworn, says: That he is one of the attorneys for the defendant in the above-entitled action, and one of its Division Counsel for the State of Montana; that the above action was tried before a jury, which rendered a verdict in favor of the plaintiff; that a petition for a new trial was made by the defendant and submitted to the Court on August 4, 1934; that said petition was denied by the Court on February 18, 1935; that the defendant desires to appeal from the judgment and from the order denying defendant's motion for a new trial.

That Nick Wagner, the plaintiff in said action, died on January 13, 1935, and letters of administration, with the Will annexed, were duly issued to his daughter, Olivia Wagner, on April 20, 1935, and an attested copy of such letters is attached to and made a part of this affidavit.

E. M. HALL

Subscribed and sworn to before me this 23rd day of April, 1935.

[Notarial Seal]

A. A. MAJOR

Notary Public for the State of Montana

Residing at Helena, Montana

My commission expires Feb. 28, 1937. [648]

In the District Court of the Seventh Judicial District of the State of Montana, in and for the County of Wibaux.

In the Matter of the Estate of Nick Wagner,  
Deceased.

LETTERS OF ADMINISTRATION WITH  
THE WILL ANNEXED.

State of Montana,  
County of Wibaux.—ss.

The last will and testament of Nick Wagner, deceased, a copy of which is hereto annexed, having been proved and recorded in the District Court of Wibaux County, Montana; and Catherine Wagner, the Executrix named therein having requested the appointment of her daughter, Olivia Wagner, of Wibaux, Montana, as Administratrix with the Will annexed herein, the said Olivia Wagner is hereby appointed Administratrix with the Will annexed in the above matter.

Witness, Hazel Carlock-Young, Clerk of the District Court of the County of Wibaux, Montana, with the seal of the Court affixed, this 20th day of April, A. D., 1935.

[Court Seal]      HAZEL CARLOCK-YOUNG  
Clerk of the District Court.

State of Montana,  
County of Wibaux.—ss.

I, Olivia Wagner, do solemnly swear that I will support the Constitution of the United States and



the Constitution of the State of Montana, and that I will faithfully perform, according to law, the duties of Administratrix with the Will annexed in the matter of the Estate of Nick Wagner, deceased.

OLIVIA WAGNER

Subscribed and sworn to before me this 20th day of April, A. D. 1935.

[Notarial Seal]      THOMAS C. COLTON

Notary Public for the State of Montana.

Residing at Wibaux, Montana.

My commission expires December 30, 1936.

Attested a true copy.

HAZEL CARLOCK-YOUNG

Clerk of the District Court. [649]

IN THE NAME OF GOD, AMEN:

I, Nick Wagner, of the Town of Wibaux, Wibaux County, Montana, being of lawful age and of sound and disposing mind and memory, do hereby make, publish and declare this my last will and testament.

1. It is my will and I do hereby direct that my Executrix, hereinafter named shall pay my funeral expenses and all my just debts as soon as may be convenient after my death.

2. I give and bequeath to my grandson, Norbit Fadden the sum of \$1000.00.

3. All of the rest, residue and remainder of my Estate, of every kind, nature and description, both

real personal and mixed and wheresoever the same may be situated, of which I may die seized, or possessed or to which I may be entitled at the time of my decease, I give, bequeath, and devise as follows, to-wit:

(a) To my beloved wife Kathrine Wagner all of said property during her lifetime with the absolute right to use such portion or portions of said property as may be necessary for the support and maintenance and clothing of my said wife Kathrine Wagner. It is my will that my wife Kathrine Wagner shall not use any of said property for any other purpose other than heretofore mentioned in this paragraph.

(b) That upon the death of my beloved wife Kathrine Wagner, it is my will that all of the rest, residue and remainder of my property be divided share and share alike between my three children, Nick Wagner, *Mrs.* Rose Fadden and Olivia Wagner.

4. It is my will that as soon as possible after my death, all of my property be sold and converted into cash, which my Executrix, hereinafter named shall place or cause to be placed in a sound financial depository, and that my wife Kathrine Wagner shall have the right to use such amounts of said cash or money as is necessary only for her support, clothing and maintenance, as aforesaid.

5. I hereby nominate and appoint my wife Kathrine Wagner to be the Executrix of this my last will and testament, and hereby request that

she be not required to furnish any bond for the faithful performance of her duties, as such Executrix, with full power and authority to sell, any or all of the property of which I may die seized, without any order of the Court.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this 4th day of May, 1929, in the presence of the undersigned witnesses, who subscribed their names hereto at my request and in my presence, and in the presence of each other.

NICK WAGNER

The foregoing instrument set forth above on this page upon which this certificate is written, was at the date hereof, to-wit June 4, 1929, subscribed in our presence by Nick Wagner, who at the same time declared the same to be his last will and testament, and at his request and in his presence, and in the presence of each other, we at the same time and place signed our names as witnesses thereto.

GEO. E. KELLER, M. D.

Address: Wibaux, Montana.

F. A. LOSINSKI

Address: Wibaux, Montana.

[Endorsed]: Filed April 25, 1935. [650]



Thereafter, on May 1, 1935, Order Reviving case in the name of Olivia Wagner, as Administratrix, etc., was duly filed and entered herein, in the words and figures following, to-wit: [651]

[Title of Court and Cause.]

ORDER.

On reading the ex parte application of the defendant, by and through E. M. Hall, one of its Division Counsel, supported by the affidavit of E. M. Hall showing the death of plaintiff, Nick Wagner, and by an attested copy of the letters of administration, with the Will annexed, issued to Olivia Wagner, as Administratrix of the Estate of Nick Wagner, deceased;

IT IS HEREBY ORDERED that said action be revived and continued in the name of Olivia Wagner, as Administrative with the Will Annexed of the estate of Nick Wagner, deceased, and that said Administratrix be and she is hereby substituted as plaintiff in the place and stead of said Nick Wagner, deceased, and that such revivor and continuance be without prejudice to any of the proceedings already had in said action.

Dated this 26th day of April, 1935.

CHARLES N. PRAY

Judge. [652]

State of Montana

County of Lewis and Clark—ss.

E. M. HALL, being duly sworn, says: That he is one of the attorneys for the defendant in the order of the Court hereto attached; that the plaintiff, Nick Wagner, at the time of his death, resided in Wibaux, Montana; that his attorneys of record in the case of Nick Wagner v. Northern Pacific Railway Company, were Thomas C. Colton, of Wibaux, Montana, and H. L. Maury, of Butte, Montana; that Olivia Wagner, as Administratrix with the Will annexed of the Estate of Nick Wagner, Deceased, who, by the attached order, was substituted as plaintiff in said action, also resides at Wibaux, Montana; that the attorneys for the defendant reside at Helena, Montana, Billings, Montana, and St. Paul, Minnesota; that between Helena, Montana, and Wibaux, Montana, there is a regular communication by mail; that affiant served a certified copy of the attached order upon Thomas C. Colton, one of the attorneys of record for Nick Wagner, and also served a certified copy of said order upon Olivia Wagner, as Administratrix with the Will annexed of the estate of Nick Wagner, Deceased, by depositing a letter addressed to each of said persons, containing a certified copy of said order, in the Post Office at Helena, Montana, on April 29, 1935, one of said letters being addressed to Thomas C. Colton, Attorney at Law, Wibaux, Montana, and the other of said letters being ad-

dressed to Olivia Wagner, as Administratrix of the Estate of Nick Wagner, Deceased, at Wibaux, Montana, with the necessary postage on each of said letters to carry the same prepaid.

E. M. HALL

Subscribed and sworn to before me this 29th day of April, 1935.

[Notarial Seal]

A. A. MAJOR

Notary Public for the State of Montana  
Residing at Helena, Montana

My commission expires February 28, 1937.

[Endorsed]: Filed May 1, 1935. [653]

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Thereafter, on May 3, 1935, Assignment of Errors was duly filed herein, in the words and figures following, to-wit: [654]

[Title of Court and Cause.]

#### ASSIGNMENT OF ERRORS.

Comes now the defendant, in the above-entitled cause, and makes and files the following assignment of errors upon which it will rely upon its prosecution of the appeal from the judgment and from the order denying its petition for a new trial in said cause, to-wit:



I.

Errors in law occurring at the trial, which are as follows, to-wit:

(a) The Court erred in over-ruling defendant's objections to the following questions propounded the witness O'Keefe:

"Q. Do you recall any incidents of people being rescued in the Davis Addition, in 1921?

A. Yes, sir.

Q. Who were some of those people and where were the houses? Point them out.

A. My sister was taken from the house where I live now, in 1921.

Mr. McCARTHY: I object to this line of testimony as incompetent, irrelevant and immaterial to any issue in this case. It appears now from the exhibit in evidence, that the water, in 1921, that got in the Davis Addition would necessarily come from the sidehills and the draws. The witness has told us that the water didn't get up in the town from the creek; therefore, it would have no question on the adequacy of the railroad bridge or not; it has nothing to do with the case.

Mr. MAURY: The range or the locality is the test. In that locality, it may be gone into to show notice,—35 miles in any direction— [655]

Mr. McCARTHY: The witness says the water of 1921 didn't get up in 1921 and do any damage. It is possible that it got up in the Davis Addition. What bearing could it have on the——

The COURT: You gentlemen ought to know. You have been through this enough. It may have

some bearing on it, and I will overrule the objection. Let it be shown briefly. I don't think we need to go into all the houses.

Mr. McCARTHY: Exception." (R.——)

(b) The Court erred in overruling defendant's objections to the following question propounded the witness Drake:

"Q. Do you recall further up the track about 3000 or 4000 feet to the east, what happened in 1921?

Mr. McCARTHY: Objected to as incompetent, irrelevant and immaterial,—outside of the drainage area of Beaver Creek—and not material to any issue in this case.

The COURT: I think I will overrule the objection.

Mr. McCARTHY: Exception.

Q. What, if anything, happened to the railway track about 3000 feet to the east of the depot?

Mr. McCARTHY: In order to save time, may we have the same objection, and the ruling, and exception?

Mr. MAURY: Yes; yes.

The COURT: Yes." (R.——)

(c) The Court erred in overruling defendant's objection to the following question propounded the witness Barclay:

"Q. Now, from there on east to your ranch house, what happened in 1921 to that railroad?

Mr. McCARTHY: Objected to as being immaterial, if the Court please, not having any bearing on Beaver Creek, or the bridge over Beaver Creek, as to what happened six miles east.

Mr. MAURY: We intend to show the intensity of the flood.

The COURT: I think so; overrule the objection.

Mr. McCARTHY: Exception." (R.——)

(d) The Court erred in overruling defendant's objection to the following question propounded the witness Lyman:

"Q. How does that correspond with the area for water to go through the old railroad bridge that existed there on June 7, 1929?

Mr. McCARTHY: That is objected to, if the Court please. If he wants to compare the area under the County bridge with the area under the railroad bridge, there is no objection. Now, he proposes to go outside of the County bridge, and taking in the possibility of an overflow and compare the possible overflow of the area of the County bridge with the area of the railroad bridge. If you will compare the area under the county bridge with the area under the railroad bridge, there is no objection. This is not a proper comparison. [656]

The COURT: I don't know if that is his object altogether.

Mr. MAURY: No, sir; it is to show the provision that others made for water there.

The COURT: On account of the height of the roadway you mean, and the height of the bridge?

Mr. MAURY: Yes, sir,—the proof that in high water, the water flowed around the County bridge over that area.



The COURT: I will overrule the objection. You may show it.

Mr. McCARTHY: Note an exception."

(e) The Court erred in sustaining plaintiff's objection to the certified copy from the War Department of the Army Engineers report on the Beaver Creek situation, Defendant's Exhibit D-12, offered in connection with the cross-examination of the witness Lyman: (R.——).

(f) The Court erred in sustaining plaintiff's objection to the certified copy from the War Department of the Army Engineers report on Beaver Creek conditions, Defendant's Exhibit D-12, when offered on direct examination of Defendant's witness Lillis (R.——).

(g) The Court erred in overruling defendant's motion at the close of all the evidence for an order directing the jury to return a verdict in favor of the defendant (R.——).

(h) The Court erred in giving the following instruction to the jury, to the giving of which the defendant duly excepted, to-wit:

"If you find from a preponderance of the evidence that Wagner suffered damage in the flood of June 7, 1929, at Wibaux, and that there were two causes which combined to produce the damage, and that both of said causes were proximate causes, as defined elsewhere in the charge of the Court; and that one of such causes was one or more of the cul-

pable negligent acts of the railway company set out in the complaint, and that the other of said causes was an act of God, then by your verdict, you should hold the railway company liable for the loss resulting from both such concurring causes, provided you should further find that the loss would not have been sustained by Wagner but for some culpable negligent act of the railway, alleged in the complaint."

## II.

The verdict is contrary to the law as given to the jury and particularly in the following portions of the Court's instructions, to-wit: [657]

(a) "If you believe from the evidence that the Railway Company, in raising the embankment of its railroad grade and constructing its bridge across Beaver Creek in 1898, employed civil engineers of at least ordinary skill and ability, and that it constructed, and thereafter maintained, the embankment and openings in question in accordance with the usage of ordinarily prudent and careful engineers under like circumstances, and so as to reasonably handle and care for such ordinary recurring floods or rises in Beaver Creek as were then known and as could be reasonably anticipated by the exercise of ordinary foresight and prudence, and that said openings did handle, in a reasonable manner, all flood waters prior to June 7, 1929, and that the flood of June 7, 1929 was an unusual, excessive and extraordinary flood, which could not

have been reasonably anticipated, then the defendant was not guilty of negligence; but the damage to plaintiff was the result of such extraordinary flood or act of God and your verdict should be for the defendant.”

(b) “A water course or stream is the channel cut by running water with well defined banks and bottom thru which water flows for substantial periods of each year.

In constructing a railway bridge, the law does not require that the full width of such channel be left open but only that the water course be restored to its original state of usefulness, as near as may be. The phrase “as near as may be”, as used in this law, does not mean “as near as might be possible”. It contemplates some variation from the original condition of the stream and allows some discretion in the engineers of the railway company in constructing a bridge to make such reasonable changes in the flow of the water therein as they find necessary in constructing a safe and practical bridge over the stream.

Even if you find from the evidence that the channel was somewhat narrowed by the bridge, as constructed in 1896 and raised in 1898, but also find that the channel was then, or thereafter, straightened and deepened, so that it still carried off all the water which could have been reasonably anticipated by the exercise of ordinary foresight and prudence, including the ordinary flood waters, without any more interference with the flow there-



of, than was reasonably consistent with the right granted the railway company to construct a safe and practical bridge over such stream, then you are instructed that there was no unlawful interference with the water course or channel of the stream by the defendant, and that it cannot be held guilty of negligence in the construction and maintenance of such bridge over the stream as it existed prior to June 7th, 1929.”

(c) “If you find that the openings in said embankment were large enough to handle, in a reasonable manner, the flood waters of Beaver Creek, prior to June 7, 1929, and that they did not impair the usefulness of the stream to a greater extent than was reasonably necessary in order to construct a safe and practical bridge, and further find that the flood on June 7, 1929 was an unusual, excessive and extraordinary flood, which could not have been reasonably anticipated by the exercise of ordinary foresight and prudence, then you are instructed that the fact, if you find it is a fact, that the openings in the embankment as they existed on June 7, 1929, were not large enough to properly carry off the water in Beaver Creek on that date, would not render the defendant liable for damages resulting from such impounded water.” [658]

(d) “If you believe from the evidence that the property of plaintiff would have been flooded to some extent and partially damaged by the flood waters of Beaver Creek on June 7, 1929, even if no railway embankment or bridges had existed there at all on that date, then the burden of proof is upon the

plaintiff to prove the amount of damages, if any, sustained by flood water, if any, in excess of the water that would have gotten into their premises had there been no railway embankment and bridges.

And if the evidence is such that you are not able to reasonably determine therefrom what damage, if any, the plaintiff sustained by reason of water, if any, in excess of what you believe would have gotten into their property had there been no railway embankment and bridges at all, then you are instructed that plaintiff has failed to prove such damages and your verdict should be for the defendant."

(e) The court erred in overruling and denying defendant's petition for a new trial.

(f) The court erred in entering judgment for the plaintiff.

WHEREFORE, the defendant prays that the judgment entered in said action be reversed and that the order denying defendant's petition for a new trial be reversed, and that said action against said defendant be ordered dismissed.

FREDERIC D. McCARTHY

JOHNSTON, COLEMAN & JAMESON

GUNN, RASCH & HALL

Attorneys for Defendant.

[Endorsed]: Filed May 3, 1935. [659]

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Thereafter, on May 4, 1935, Petition for Appeal and Order Allowing Appeal were duly filed and entered herein, in the words and figures following, to-wit: [660]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Comes now the defendant above-named, Northern Pacific Railway Company, and feeling itself aggrieved by the verdict of the jury and the judgment entered thereon, for \$5000.00 damages and \$1052.53 costs, in favor of the plaintiff, on the 14th day of April, 1934, and by the denial of its petition for a new trial of said cause on February 18, 1935, does hereby appeal from said judgment and the whole thereof, and from the order denying said petition for new trial, and prays that this appeal may be allowed and that a transcript of the record and of the proceedings and papers upon which said verdict, judgment, and order denying said petition for a new trial were made, rendered and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, and also that an order be made fixing the amount of security which the defendants shall give and furnish upon said appeal and that upon giving of such security, all further proceedings in this Court be suspended and stayed until the determination [661] of said appeal by the United States Circuit Court of Appeals, for the Ninth Circuit.

FREDERIC D. McCARTHY

JOHNSTON, COLEMAN & JAMESON

GUNN, RASCH & HALL

Attorneys for Petitioner.



ALLOWANCE OF APPEAL AND FIXING  
BOND.

An assignment of errors having been filed with the foregoing Petition for Appeal, IT IS ORDERED that the appeal of the defendant in the above-entitled action, from the judgment heretofore made, given and made therein, in favor of Nick Wagner, now deceased, and against the defendant, and from the order denying defendant's petition for a new trial, be allowed as prayed for in defendant's petition for appeal filed herein, and that a certified transcript of the record, bills of exceptions, exhibits, stipulations and all proceedings be transmitted to the Circuit Court of Appeals, for the Ninth Circuit of the United States.

IT IS FURTHER ORDERED that a bond on appeal in the penal sum of Seven Thousand Five Hundred (\$7500.00) Dollars, in the form and with sureties approved by the Court, be given for the payment of all damages and costs *of the* defendant, shall fail to make good its appeal; and, that upon the filing of such a bond, with approved sureties, further proceedings in this Court be stayed pending the determination of the appeal in the Circuit Court of Appeals.

Dated this 4th day of May, 1935.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed May 4, 1935. [662]

Thereafter, on May 4, 1935, Bond on Appeal was duly approved and filed herein, in the words and figures following, to-wit: [663]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, the Northern Pacific Railway Company, a corporation, organized and existing under the laws of the State of Wisconsin, as principal, and St. Paul-Mercury Indemnity Company, a corporation, organized and existing under and by virtue of the laws of Minnesota, and qualified and authorized to do business in Montana, to execute bonds and undertakings, and to act as surety generally within the District and State of Montana, are held and firmly bound unto Olivia Wagner, as Administratrix, with the Will annexed of the estate of Nick Wagner, deceased, the plaintiff above named, in the full sum of Seventy-five Hundred Dollars (\$7500.00), to be paid to the said plaintiff, as such Administratrix, her certain attorneys, successors or assigns, for which payment well and truly to be made, said principal and surety bind themselves, their and each of their successors and assigns, jointly and severally, firmly by these presents.

SEALED AND DATED this 4th day of May, 1935.

WHEREAS, in the District Court of the United States, for the District of Montana, in the above-entitled suit, pending in said Court, [664] between

Olivia Wagner, as Administratrix with the Will annexed of the Estate of Nick Wagner, deceased, plaintiff, and the Northern Pacific Railway Company, a corporation, defendant, a judgment was rendered against said defendant for the sum of Five Thousand (\$5000.00) Dollars, and costs taxed at \$1052.53, which judgment was entered on the 14th day of April, 1934, and said defendant has petitioned for an appeal from said judgment to the Circuit Court of Appeals of the United States, for the Ninth Circuit, and from the order denying its petition for a new trial, and an order has been made allowing said appeal, and said defendant proposes to prosecute said appeal to reverse the said judgment and order denying it a new trial, and to answer all damages and costs if it fails to make its plea good.

NOW, THEREFORE, in consideration of said appeal, the condition of this obligation is such that if the Northern Pacific Railway Company, a corporation, shall prosecute its said appeal to effect and answer all damages and costs, if it fails to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

NORTHERN PACIFIC RAILWAY  
COMPANY,

By E. M. HALL

One of its Division Counsel for  
the State of Montana.

ST. PAUL-MERCURY INDEM-  
NITY COMPANY,

By A. A. MAJOR

Its Attorney-in-Fact.



The foregoing bond, to operate as a supersedeas, is approved this 4th day of May, 1935.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed May 4, 1935. [665]

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Thereafter, on May 4, 1935, Citation of Appeal was duly issued herein, which Original Citation was hereto annexed and is in the words and figures following, to-wit: [666]

[Title of Court and Cause.]

CITATION.

United States of America to Olivia Wagner, as Administratrix, with the Will Annexed of the Estate of Nick Wagner, Deceased, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear in the United States *District* Court of Appeals, for the Ninth Circuit, to be held at the City of San Francisco, California, within thirty (30) days from the date hereof, pursuant to an order filed and entered in the office of the Clerk of the District Court of the United States, for the District of Montana, allowing an appeal from a judgment filed and entered in said Court on the 14th day of April, 1934, in favor of Nick Wagner, now deceased, and an order on April 18, 1935 denying defendant's petition for a new trial, being an action at law, No. 566, wherein you have, by

an order of the above-entitled court, dated April 26, 1935, been substituted as plaintiff in place of Nick Wagner, and the Northern Pacific Railway Company is the defendant, to show cause, if any there be, why the judgment rendered against the said defendant, and the order denying its petition for a new trial as in said appeal mentioned, should not be reversed and corrected, and why justice should not be done the parties in that behalf.

Dated this 4th day of May, 1935.

CHARLES N. PRAY

United States Judge for the District of  
Montana. [667]

United States Marshal's Office  
District of Montana

I hereby certify that I received the within writ on the 6th day of May, 1935, and personally served the same on the 7th day of May, 1935, by delivering to, and leaving with Olivia Wagner, as Administratrix, with the Will annexed, of the estate of Nick Wagner, deceased, the plaintiff named in said citation, personally, and also by delivering to and leaving with Thomas C. Colton, one of the attorneys of record for the plaintiff in said cause, personally, at Wibaux, in the County of Wibaux, State of Montana, a copy of said citation.

SID A. WILLIS

U. S. Marshal.

By E. LIEBERG

Deputy.

Helena, May 8, 1935.

[Endorsed]: Filed May 10, 1935. [668]

Thereafter, on May 10, 1935, Defendant's Praecipe for Transcript on Appeal, was duly filed herein, in the words and figures following, to-wit: [670]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-Entitled Court:

Please prepare a transcript of the record, for the purpose of an appeal of said case to the United States Circuit Court of Appeals, for the Ninth Circuit, and include therein the following:

1. Plaintiff's complaint;
2. Petition for removal to Federal Court;
3. Notice of Intention of filing Petition for Removal;
4. Order of Removal;
5. Motion to remand to State Court, with affidavits attached;
6. Minute entry of order denying motion to remand;
7. Answer of Defendant;
8. Reply to Answer;
9. Verdict of Jury;
10. Judgment;
11. Bill of Exceptions of Evidence;
12. Petition for new trial;
13. Order denying motion for new trial;
14. Bill of Exceptions No. 2 on order denying motion for new trial;
15. Application for order reviving and continuing case in name of Olivia Wagner, etc.



16. Order reviving and continuing case in name of Olivia Wagner, as Administratrix, etc.
17. Defendant's petition for appeal, and order allowing appeal;
18. Assignment of Errors;
19. Bond on Appeal;
20. Citation on appeal;
21. This Praecipe.

FREDERIC D. McCARTHY

JOHNSTON, COLEMAN & JAMESON

GUNN, RASCH & HALL

Attorneys for Appellant and Defendant. [671]

State of Montana

County of Lewis and Clark—ss.

E. M. HALL, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant, Northern Pacific Railway Company, in the above-entitled cause; that the attorneys for said defendant reside and have their offices in St. Paul, Minnesota, Billings, Montana, and Helena, Montana; that Thomas C. Colton and H. L. Maury, the attorneys of record for plaintiff in said action, reside and have their offices in the town of Wibaux, and the City of Butte, Montana, respectively. That between the town of Wibaux, and Helena, Montana, there is a regular communication by mail; that affiant served the foregoing praecipe for transcript of record upon Thomas C. Colton, attorney for plaintiff, by depositing a letter containing a copy thereof in the Post Office at Helena, Mon-

tana, on May 10th, 1935, addressed to said Thomas C. Colton, Attorney at Law, Wibaux, Montana, with the necessary postage thereon to carry said letter prepaid.

E. M. HALL

Subscribed and sworn to before me this 10th day of May, 1935.

[Notarial Seal]

A. A. MAJOR

Notary Public for the State of Montana.

Residing at Helena, Montana

My commission expires Feb. 28th, 1937.

[Endorsed]: Filed May 10, 1935. [672]

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Thereafter, on May 17, 1935, Plaintiff's Praecipe for additional Transcript of Record was duly filed herein, in the words and figures following, to-wit:

[Title of Court and Cause.]

**PRAECIPE FOR ADDITIONAL TRANSCRIPT  
OF RECORD.**

To the Clerk of the above entitled Court:

Please add to the praecipe for transcript of the record heretofore given you and served on us, as attorneys for the appellee or plaintiff, the following, and forward them, duly certified, to be used on the appeal, and to become a part of the record on appeal of this cause, to the Circuit Court of Appeals, for the Ninth Circuit, and include in such record every exhibit that was introduced in evi-

dence on the part of the plaintiff or on the part of the defendant, every model, every diagram, every relief map, every document of any kind, used or introduced in evidence; and also copy of this prae-cipe.

Yours very truly,

THOMAS C. COLTON

H. L. MAURY

Attorneys for Plaintiff and

Appellee. [673]

State of Montana

County of Silver Bow—ss.

H. LOWNDES MAURY, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff, in the above entitled cause; that the attorneys for the defendant reside and have their offices in the City of St. Paul, Minnesota, Billings, Montana, and Helena, Montana, respectively, said attorneys being Messrs. Frederic D. McCarthy, Johnston, Coleman & Jameson, Gunn, Rasch & Hall; That between the City of Butte and Helena, Montana, there is a regular communication by mail; that affiant served the foregoing prae-cipe for additional transcript of record upon Messrs. Gunn, Rasch & Hall, attorneys for defendant, by depositing a true copy thereof in the Post Office at Butte, Montana, on May 15th, 1935, addressed to said Messrs. Gunn, Rasch & Hall, Attorneys at Law, Helena, Montana, with the necessary postage thereon to carry said letter prepaid.

H. LOWNDES MAURY



Subscribed and sworn to before me this 15th day of May, A. D., 1935.

[Notarial Seal]

RUTH BARRETT

Notary Public for the State of Montana.

Residing at Butte, Montana.

My commission expires Dec. 8th, 1936.

[Endorsed]: Filed May 17, 1935. [674]

CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD.

United States of America,  
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing 2 volumes, consisting of 674 pages, numbered consecutively from 1 to 674 inclusive, is a full, true and correct transcript of all portions of the record and proceedings in Case No. 566, Olivia Wagner, as Administratrix, etc. vs. Northern Pacific Railway Company, which have by praecipe been designated to be incorporated into said transcript, (save and except the documents and exhibits designated in the appellee's praecipe for additional transcript of record), as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of One Hundred Six and 75/100 Dollars (\$106.75), and have been paid by the appellant.

WITNESS my hand and the seal of said court at Helena, Montana, this May 24th, A. D. 1935.

[Seal]

C. R. GARLOW,

Clerk U. S. District Court,

District of Montana. [675]

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[Endorsed]: No. 7876. United States Circuit Court of Appeals for the Ninth Circuit. Northern Pacific Railway Company, a Corporation, Appellant, vs. Olivia Wagner, as Administratrix with the Will Annexed of the Estate of Nick Wagner, Deceased, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed May 27, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

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IN THE  
United States Circuit Court  
of Appeals <sup>3</sup>

FOR THE NINTH CIRCUIT.

No. 7876

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NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
*Appellant,*

vs.

OLIVIA WAGNER, as Administratrix with the Will Annexed of  
the Estate of Nick Wagner, Deceased,  
*Appellee.*

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BRIEF OF APPELLANT.

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FREDERIC D. McCARTHY,  
of St. Paul, Minnesota,

JOHNSTON, COLEMAN & JAMESON,  
of Billings, Montana,

GUNN, RASCH & HALL,  
of Helena, Montana,  
Attorneys for Appellant.

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FILED

JUL 14 1935

PAUL H. JOHNSON,  
CLERK





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IN THE  
**United States Circuit Court  
of Appeals**

FOR THE NINTH CIRCUIT.

No. 7876

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NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,  
*Appellant,*

vs.

OLIVIA WAGNER, as Administratrix with the Will Annexed of  
the Estate of Nick Wagner, Deceased,  
*Appellee.*

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**BRIEF OF APPELLANT.**

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**STATEMENT OF CASE.**

In this brief, in referring to the parties to the action, we shall designate them as plaintiff and defendant instead of appellee and appellant.

The action was dismissed as to all defendants other than the Northern Pacific Railway Company (R. p. 46). This action was begun in the District Court of Wibaux County, Montana, and removed to the United States District Court on the ground of diversity of citizenship. A motion to remand was denied (R. pp. 9-29). By this action it was sought to recover \$15,000.00 alleged damages to the property of Nick Wagner, now

deceased, located in a store building in the south half of the town of Wibaux, Montana. The damage to the property was caused by flood waters from a creek flowing through the town, on June 7, 1929 (R. pp. 2-8). Plaintiff claimed that the damage in question was occasioned by the negligence of the defendant in failing to provide an adequate opening in its railroad embankment to permit the free flow of water in the creek and that the bridge provided by defendant was negligently constructed in that it failed to provide a sufficient opening to permit the passage of ordinary high waters in the creek. The defendant denied that it was in any way negligent and contended that the damage was caused by an unusual, extraordinary and unprecedented flood which could not have been reasonably anticipated by defendant (R. p. 35). The bridge in question had been in place for 31 years.

At the close of all the evidence, defendant moved for a directed verdict (R. p. 799), which motion was denied. A verdict was returned in favor of the plaintiff for \$5,000.00 (R. p. 821). A petition for a new trial was filed (R. pp. 825-830) and a new trial was denied (R. p. 837). Olivia Wagner, as Administratrix of the Estate of Nick Wagner, deceased, was substituted as plaintiff (R. p. 858), and petition for appeal from the judgment and order denying the petition for a new trial was filed and allowed (R. pp. 869-870).

### **THE FACTS.**

Wibaux, Montana, is a city of approximately 600 in population, located in eastern Montana approximately 8 miles west of the North Dakota state boundary on the line of the Northern Pacific Railway Company. Wibaux is located in a hollow or valley with high ground on both sides of it. The railroad track is on an embankment which, in running through the town, di-

vides the same, the railroad being laid out at this point almost due east and west. What is ordinarily a small shallow creek which a man could step across in many places with not much more than a trickle of water in it (R. pp. 549 & 555), known as Beaver Creek, flows through the town. The creek rises in the south and flows to the north intersecting the railroad track and embankment at right angles. Beaver Creek rises in the vicinity of Ollie, Montana, approximately 40 miles south of the town of Wibaux (R. pp. 341 & 348). The creek has 17 tributaries (Ex. Y-13, R. p. 304). During a large part of a normal year these tributaries are so-called dry creeks, that is, no regular or steady flow of water takes place in them. The contour, course and character of the stream south of Wibaux for about 30 miles is similar to that at Wibaux (R. p. 279). The track is carried over the creek at Wibaux by means of a bridge. The country drained by Beaver Creek and its tributaries covers approximately 342 square miles.

On the night of June 6 and morning of June 7, 1929, a series of unusual storms took place throughout the Beaver Creek Valley (R. pp. 345, 350, 355, 363 & 397). The storms were in the form of so-called cloudbursts. As a result of these unusually heavy downpours of rain, the like of which never before occurred in the history of the valley, Beaver Creek and its tributaries overflowed their banks. The result was the forming of a large river which swept across country carrying away farmhouses, barns, granaries, and fences. Twelve or more county bridges were washed out. A great deal of stock and sheep was drowned. Property damage ran into many thousands of dollars. Practically every farm adjoining the creek for 30 miles south of the town of Wibaux and those farms located several miles north of Wibaux were damaged by the flood waters (R. pp. 343, 346, 354, 357, 365, 379, 384, 385, 391, 398-402).



The river formed by the flood reached the south half of the town of Wibaux sweeping away buildings, and a steel bridge (R. p. 61) located in the town. Some of the buildings were carried to and against the railroad embankment. Three people were drowned. This damage was accomplished by the flood water *before* the same reached the railroad embankment (R. pp. 101, 445-447, 512-514, 640, 724, 728, 738, 746-748 & 751). Defendant's engineers estimated the flow of water was more than 30,000 cubic feet per second at the time of the flood. The greatest known flow of water in the creek prior to the 1929 flood was approximately 10,000 cubic feet per second (R. pp. 330, 337, 663 & 790). The water washed out a considerable part of the railroad embankment. This washing out of the railroad embankment occurred prior to the peak of the flood (R. p. 641, 642). This resulted in the creation of waterways in addition to that afforded by defendant's bridge (R. pp. 56, 69, 149, 228, 507). According to plaintiff's own witness after the railroad embankment went out the water went down and then rose again (R. p. 63).

While it is not unusual for a cloudburst to occur in the area drained by Beaver Valley, this large number of cloudbursts occurring almost simultaneously was most unusual. These cloudbursts occurred not only in the vicinity of the creek proper, but on the tributaries of the creek. The result was that instead of the excess water caused by the cloudbursts being taken up by the stream in following its meandered course, the stream overflowed its banks, failed to follow the meandered course of the stream, and swept directly down the valley in the form of a swift flowing river, from a quarter to half a mile wide comparable to the Yellowstone or Missouri Rivers in flood time (R. pp. 351, 357, 401-403, 423, 521 & 524).

A large relief map about 8 feet by 9 feet square was introduced in evidence by the defendant, which is drawn to a scale of 50 feet equals 1 inch, vertically and horizontally (R. p. 309). This map shows the railway bridge, embankment, viaduct under the track at Main Street, county bridge, course of the stream, the buildings in Wibaux, and south thereof as far as Massey's place, the elevation of adjacent ground east and west, etc. (R. pp. 58, 308-309, 576-581 & 704).

For the convenience of the court, having in mind the size of the relief map, we have inserted in this brief a sketch of Wibaux, based on the relief map and testimony, giving some of the locations to enable the court to get some idea of the layout of the town.

### THE ISSUES.

The complaint alleges that in June, 1921, and in other years, floods occurred, causing the water to rise within six inches as high on defendant's embankment as it did on June 7, 1929; that after each of said floods the town council and commercial club notified the defendant that the opening in said embankment was insufficient (R. p. 5); that the defendant negligently failed to provide an opening in the embankment sufficient to handle ordinary high waters in Beaver Creek, or, as stated in the complaint, "to permit the free flow of said water in a safe shallow sheet on the flood plane *in ordinary seasonally recurring high water*" (R. p. 6), and that by reason of such alleged negligence the property of plaintiff was flooded and damaged.

The defendant denied that it had failed to provide sufficient openings to handle ordinary high waters in said stream; denied that there were prior to June 7, 1929, other high waters rising to the height alleged in the complaint, and denied that it had been notified by the town council or commercial club



that the opening in said embankment was insufficient (R. p. 31).

As an affirmative defense, defendant alleged that its right of way where it crosses Beaver Creek Valley, was granted by the Act of Congress of July 2, 1864 (13 U. S. Stat. 365); that its road across such valley, where the town of Wibaux was established later, was constructed in 1881, and that the several bridges across Beaver Creek were constructed by defendant in conformity with the judgment, experience, and skill of highly qualified civil engineers; that several years prior to 1929 a county highway bridge of less capacity than the railroad bridge was constructed across the creek 600 feet south of the railway bridge (R. pp. 32-35); that the flood of June 7, 1929, was an unusual, extraordinary and unprecedented flood, which could not have been reasonably anticipated by defendant (R. p. 35). The plaintiff in his reply admitted defendant's allegations as to the manner of acquiring its right of way, the construction of the railroad in 1881, the construction of the highway bridge over Beaver Creek, but denied that the flood of June 7, 1929, was an extraordinary and unprecedented flood (R. p. 40).

### **DEFENDANT'S CONTENTIONS.**

It is the contention of defendant and appellant that the verdict is wholly unsupported by the evidence for the reasons:

1. That the flood of June 7, 1929, was an unprecedented flood or act of God.

2. That the defendant, in the construction of its railroad, was not required to anticipate or guard against such an event.

3. That, according to all the evidence, the embankment and bridge of the Railway Company crossing Beaver Creek had never retarded or impounded the water of the creek to the extent that it ever affected the site on which was located the prop-



erty of the plaintiff and the property of the plaintiff would not have been damaged except for the unprecedented flood of June 7, 1929.

4. That as the railway embankment and bridge never obstructed the flow of the water of Beaver Creek to the extent of affecting the property of the plaintiff, and the property of the plaintiff would not have been damaged except for such unprecedented flood, the evidence wholly fails to show any actionable negligence or failure of the performance of duty by the defendant as to the property of the plaintiff which was damaged by the flood of 1929.

5. That as the evidence conclusively shows that the property of the plaintiff would not have been damaged except for such unprecedented flood or act of God, any negligence in the construction of the railway embankment and bridge, which may have resulted in damage to property adjacent to the stream situated at a lower elevation than the property of the plaintiff, was not the proximate cause of the damage to the property of the plaintiff.

6. That, according to all the evidence, the damage to the property of the plaintiff was occasioned, in part at least, by such unprecedented flood and there is no evidence by which the jury could have segregated the damage occasioned by the flood.

7. That there is no evidence of any negligence on the part of the defendant in the construction of the bridge crossing Beaver Creek or the embankment adjacent thereto.

The question of the sufficiency of the evidence is presented by the assignment of error in overruling defendant's motion for a directed verdict (R. p. 864), and the assignment of error in overruling defendant's petition for a new trial (R. p. 868).

It is further contended that the trial court erred in sustaining an objection to the introduction in evidence of defendant's

Exhibit D-12, which is a copy of a report of Army Engineers to the Department of War relating to the physical conditions and flood control at Wibaux, made after the flood of 1929 (R. pp. 322-324, 333 & 686).

The action of the trial court in sustaining this objection is assigned as error (R. p. 864).

### **SPECIFICATIONS OF ERROR.**

1. The trial court erred in overruling defendant's motion for a directed verdict in its favor (R. p. 799).

2. The trial court erred in overruling and denying defendant's petition for a new trial (R. p. 825).

3. The trial court erred in sustaining the objection to the introduction in evidence of Defendant's Exhibit D-12 (R. pp. 322-324, 333 & 686).

## ARGUMENT AND AUTHORITIES.

### I.

#### UNPRECEDENTED FLOOD.

FAILURE TO ANTICIPATE AND GUARD AGAINST AN ACT OF GOD,  
CONSISTING OF AN UNPRECEDENTED FLOOD, IS  
NOT NEGLIGENCE.

If the flood of 1929 was unprecedented, the fact that the opening was insufficient and that the embankment impounded the water, whether it was ten inches, three feet, or six feet, does not make the defendant liable for damages caused thereby if it had provided an opening in the embankment sufficient to handle the *ordinary rains and flood waters* that might reasonably be expected. The defendant was not required to anticipate and guard against an act of God.

“A railroad company, acting in pursuance of legislative authority, is only required to exercise reasonable diligence and precaution in constructing passageways for the water through its bridges and embankments, and is entitled to select a safe and massive structure, in preference to a lighter one, which would less obstruct the water. It is not liable to an action for damages if it fails to construct a culvert or bridge so as to pass extraordinary floods.” *Central Trust Co. of New York v. Wabash, St. L. & P. Ry. Co.*, 57 Fed. 441, 446.

*Heckaman v. N. P. Ry. Co.*, 93 Mont. 363, 20 Pac. (2d) 258, at page 263, paragraph 13, and cases there cited;

*Peel v. Chicago, Milwaukee, etc. R. Co.*, 94 Mont. 334, 22 Pac. (2d) 617;

*Memphis & Charleston R. Co. v. Reeves*, 10 Wall. 176;  
*Gleeson v. Virginia Midland R. Co.*, 140 U. S. 435;



*Chicago, etc. Ry. Co. v. Turner*, 284 Pac. (Okla.) 855;  
*Sherwood v. St. Louis S. W. Ry. Co.*, 187 S. W. (Mo.)  
 260;

*Harris v. St. Louis, etc. R. Co.*, 27 S. W. (2d) (Mo.)  
 1072;

*Lyon v. Chicago, etc. R. Co.*, 45 Mont. 33, 121 Pac. 886.

#### THE FLOOD IN QUESTION WAS UNPRECEDENTED.

The flood of 1929 was far greater than any prior high water in Beaver Creek at Wibaux.

The melting of winter snow or heavy rains in May or June occasionally increases the flow until the creek overflows the first banks of the normal channel (R. p. 278), and covers the *low ground below* the level of the second bank or level on which the buildings of the town are located. Prior to 1929 the water never got over the second bank (R. pp. 250, 436, 694, 717-718).

Between 1881 and 1929, water during heavy rains got out of the first banks on various occasions and, according to the Railway Company's records, and the evidence herein, the highest water at Wibaux prior to 1929 was in 1893, 1897, and 1921 (R. pp. 585-588, 633-634, 691 & 712).

All witnesses on this point agree that the high water in 1921 was the highest at Wibaux prior to 1929 (R. pp. 298, 436, 442, 454, 461, 471, 482, 591 & 692).

In 1893 and 1897, the elevation of the high water was the same (R. p. 585). In 1893 it was 7.3 feet below the base of the rails on the bridge over Beaver Creek. In 1896, the track was raised 3½ feet. In 1897, the high water was 10.8 feet from the base of the rails, as raised in 1896 (R. p. 633). In 1898, the track was again raised 5 feet (R. p. 620), and the high water elevation in 1921 was 11 feet below the base of the rails as raised in 1898 (R. pp. 635 & 692).

So the water was 4.8 feet higher in 1921 than in 1893 or 1897.

The high water mark on the bridge in 1929 was 2.8 feet below the top of the ties, or base of the rail (R. p. 588), *so the high water mark of 1929 was 8.2 feet higher than in 1921*, when it was 11 feet below base of rails.

As shown hereafter, the 1929 flood reached an elevation of 2640 feet and was 5 feet above the elevation of Wibaux Street, where plaintiff's store stood, which street had an elevation of 2635 feet above sea level. The water coming down Beaver Creek in 1921, with the same railway bridge, embankment and viaduct at Main Street as existed in 1929, did not get high enough to run down Wibaux or Main Street, on which plaintiff's store was located (R. pp. 51, 73, 74, 84, 118, 155, 436, 694, 717 & 720).

No material damage was done to any property in Wibaux in 1921 by water from Beaver Creek (R. pp. 84, 454, 591, 655, 717 & 736).

The elevation of Wibaux Street above sea level at its intersection with First Avenue South, where plaintiff's store stood on the northeast corner, is 2635 feet (R. p. 559), and the elevation of Wibaux Street at the intersection of Orgain Avenue, just south of the railway embankment, is 2635.4 feet (R. p. 305).

The high water elevation above sea level at the railway bridge or embankment in 1921 was 2631.8 feet and at the same point in 1929 it was 2640 feet and 2640.1 feet in the plaintiff's store (R. pp. 326 & 560).

The elevations of the high water in 1893 and 1897, and in 1921 and 1929, at the railway bridge, are shown by wires placed on the bridge models, introduced in evidence, and by photostatic copy of the bridge records (Exhibits D-23 and D-24) (R. p. 575).



The evidence is undisputed that the maximum flow of water in 1921 was 10,000 cubic feet per second or 75,000 gallons of water passed a given point per second. In 1929, according to defendant's engineers and the Army engineers (see Exhibit D-12), more than 30,000 cubic feet of water or more than 225,000 gallons of water passed a given point per second. In other words, the *1929 flood was three times as great as the 1921 high water*. The method of determining the number of cubic feet per second passing a given point, and the testimony which established conclusively that the 1929 flood was more than three times greater than any known prior water are set forth at p. 20 of this brief.

In 1929, a series of cloudbursts occurring at different points on Beaver Creek and its tributaries south of Wibaux (R. pp. 345, 350, 355, 363 & 397) combined to produce the extraordinary flood of June 7, 1929. This flood washed away embankments, buildings, granaries, trees, miles of fences, numerous highway bridges, heavy farming machinery, and drowned many head of stock all along Beaver Creek for a distance of about thirty miles south of Wibaux and at various points where the physical conditions were very similar to those at Wibaux, showing that the railway bridge and embankment had nothing to do therewith. See testimony of various farmers living along the creek south of Wibaux (R. pp. 343, 346, 354, 357, 365, 379, 384, 385, 391, 398-402).

The 1929 flood also washed away several buildings and the steel highway bridge in Wibaux, carrying them down or north towards the railway embankment. The movement of the water coming down the creek and valley in large waves as it approached and hit the town is well described by Edith Jones, twenty-two years of age. Her testimony, in substance, was as follows:



That in June, 1929 she was living two and a half miles south of Wibaux and about half a mile to the east of Beaver Creek, and had lived there 17 years; that it stormed during the night of June 6 and morning of June 7, 1929; that shortly after daylight and between 3:00 and 3:30 a. m. she observed water over the grade connecting the high grounds on which their barn and house were located; that the water *at that time* was not as high as in 1921 (R. p. 461 & 482); that she secured her saddle horse and rode to the south until she reached a high creek bank. From the bank she observed the water rising in the creek. While watching the water rising she heard a muffled roar; "almost like thunder" and looking to the south saw a bank or low wall of water "boiling up—rolling up" and coming from south toward the north. That the water spread out to a width of about a quarter of a mile. The wave appeared to be about 3½ feet high; a second wave moving more swiftly than the first one followed the first one; and the second wave was followed by several smaller ones. That after a short while she rode rapidly north toward Wibaux; and that on reaching the north bank of the creek the wave of water was still to the south of her. She again rode for the town of Wibaux. At times her horse was running, and at other times the horse had to struggle to get through water. That upon reaching the town of Wibaux she proceeded down a street in the Davis Addition just east of the creek until she got as close as possible to the county bridge that crossed the creek in town. She remained in that general location some time. After arriving in town she saw a large wave of water come past the Massey (Tom Rush) place—a large share of the water going to the north past the city water tower and into and through the town; she saw the yellow house floating north in the water; saw the Methodist parsonage floating from west to east past the blacksmith shop until it got in the main channel; saw it move to the north; saw the water rise until it covered an automobile which was standing near the Miller (green) house; saw a shed located near the Miller house washed

away; saw the water go to the west of the Miller house and to the west of the Kinney house. The water in a large volume poured into town about 6:30 a. m. She saw people in the Davis Addition move in a southerly direction on to ground that is higher than that of the Davis Addition. That water came down from Possum Hollow, running to the north. That the water she saw in the Davis Addition was all moving toward the north (R. pp. 460-494).

That the water came down in a large wave or wall of water, hit the south end of town and rushed on through the town, washing away the buildings described by Miss Jones and also washing away the heavy steel county highway bridge (R. p. 61), was also observed and testified to by the following witnesses, then in Wibaux, to-wit: Drake (R. p. 101), Mrs. Edighoffer (R. pp. 445-447), Paulsen (R. pp. 512-514), Zinda (R. p. 640), Jobe (R. p. 724), Kimball (R. p. 728), Woodard (R. p. 738), Mrs. Hayes (R. pp. 746-748), and Rowe (R. p. 751).

The newspaper published by Charles W. White, a plaintiff in a similar action, in Wibaux on June 13, 1929 (Defendant's Exhibit "C", introduced in evidence), in describing the flood, refers to this wall of water in Wibaux at that time (R. p. 113).

A wall of water, estimated at from 4 to 6 feet high, coming down the valley towards Wibaux was also seen by a number of the farmers, to-wit: Lund (R. p. 357), Efta (R. p. 371), Miesoloski (R. pp. 398-402), Burke (R. pp. 419 & 420).

There is no evidence that other high waters in said stream prior to 1929 ever did any material damage, either in the town or south along the stream. In fact, it appears that there was no damage from such other high waters (R. pp. 73, 84, 454, 591, 655, 717 & 736).

Every witness interrogated on this point testified that the 1929 flood in Beaver Creek at Wibaux was the greatest in the history of the stream.



Tom Rush has lived near Wibaux since 1884 (R. p. 433), and until 1924 owned the ranch now known as the Massey Ranch (R. p. 141). The Massey ranch is located about 2250 feet south of the town, and shown on the relief map at the south side thereof. Rush had a cow shed built on the bank of the stream south of his buildings, with its top about level with the top of the bank (R. p. 556). He testified that prior to 1929 water never got up into his cow shed or high enough to run along the highway east of his buildings (R. p. 435). See also, Massey's testimony (R. p. 143). In 1929, the water got up to the top of this cow barn (R. p. 143), and also ran over the bank and along the highway east of the Massey house about 1½ feet deep (R. pp. 145-146). Defendant's Exhibit D-17, introduced in evidence, shows in color the low water mark and the high water mark at Masseys and also the height of the top of this cow shed and of its floor (R. p. 558). The difference between the low water mark and the high water mark as shown by this exhibit is 14.2 feet.

John Brophy, who has lived on the bank of Beaver Creek about 5½ miles south of Wibaux since 1882 (R. p. 388), testified:

“There was no comparison whatever between this storm of June 6 and 7, 1929, and with any high water that I had ever seen at my place before.” (R. p. 392).

Dan Sutherland, a witness for the plaintiff, who has lived in Wibaux since 1901 (R. p. 154), and who is a plaintiff in a similar suit against the defendant to recover damages on account of this 1929 flood (R. p. 165), testified:

“It looked like a great wide river there; there was a lot of water there; and this water was flowing from the south towards the north, and towards Wibaux,—it always flows that way. This 1929 high water was beyond anything I



had ever seen in the way of a flood there in Wibaux in 33 years." (R. p. 167).

The following witnesses along said stream, who have lived in said valley from 18 to 25 years, also testified to the same effect, to-wit: Bryson, R. p. 343; Stark, R. p. 346; Moline, R. p. 352; Lund, R. p. 357; Shea, R. p. 365; Holstein, R. p. 378; Linn, R. p. 387; Miesoloski, R. p. 403; Edith Jones, R. pp. 461-464 & 471; Paulsen, R. pp. 512-514.

No witness testified to the contrary.

Two witnesses testified for the plaintiff, in rebuttal, as to local cloudbursts, and an ice gorge some 25-30 miles south of Wibaux, occurring in the years 1904, 1907, 1909, and 1925, and that, in their opinion, the rain was as heavy or heavier on some of these occasions than it was at their respective places in 1929. (See testimony of Dennis, R. pp. 752-759 and Nelson, R. pp. 760-763). There is nothing in their testimony to show that the water from these local storms, so far away, ever reached Wibaux in sufficient quantity to attract any notice there. In fact, their evidence clearly indicates that it did not. Mr. Bushell was at his ranch, 25 miles south of Wibaux in 1907, and observed the cloudburst that year in that vicinity, and the next day drove back to Wibaux. He testified that there was no evidence of high water at Wibaux from this cloudburst at his ranch (R. pp. 716-717).

#### HIGH WATER IN 1921.

Plaintiff attempted to show that more of the town of Wibaux was flooded in 1921 than in 1929, but the evidence shows that the heavy rain in 1921 fell right in the town and immediately west and east thereof (R. pp. 73 & 133). There is high ground just west of the town, known as Cemetery Hill, and at the base of this hill along the west side of town is a swale or depression

slightly lower than the elevation of Main Street. Also on the east side of town—east of the Davis Addition,—there is high ground, drained by “Possum Hollow”, which conveys the water into and through Davis Addition. These physical conditions are clearly shown on the large relief map introduced in evidence.

With a heavy rain in town and adjacent thereto, the water from Cemetery Hill flows down into town before it reaches the creek, and on the east side it would run down Possum Hollow and through the Davis Addition before reaching the creek. See testimony of Pickering (R. p. 59), Barclay (R. pp. 133-135), Lehin (R. p. 263).

Bushell testified:

“I was in Wibaux in 1921. I heard the testimony as to the 1921 flood. Describing briefly the extent of the storm and any high water in Wibaux in 1921,—the 1921 flood came mostly from the east and southeast. On the east side of the Davis Addition there was quite a lot of water; that is what has been described as Possum Hollow (you are pointing to it); there was quite a lot of water over on that side clear down to the industrial track of the railroad, and some parts of that were washed out. By ‘industrial track’ I mean where the elevators are. As to the extent of the water in the town of Wibaux, well there was a small stream ran to the west along the right-of-way and turned at the lumber yard and went down under the viaduct. There was no water at all on Main Street or Wibaux Street. As to whether there was any water at all in that part of town west of Wibaux or Main Street, there was only this little stream that ran down along to the viaduct—that little stream that ran down along the railroad track and to the viaduct.” (R. pp. 717-718).

There was no water on Wibaux or Main Street in 1921, except at the extreme southern end near the creek which is sev-

eral feet lower (R. pp. 305-306) than where plaintiff's store stood. (See testimony of O'Keefe, R. p. 73; Sherman, R. p. 84; Drake, R. p. 98; Rife, R. p. 118, and Sutherland, R. p. 155, all witnesses for plaintiff).

Mr. Blum, Chief Engineer of the Railway Company, was in Wibaux in 1921 immediately following the high water of that year. He testified that there was no water over the streets or around the buildings in Wibaux proper.

First and Second Avenues South, as shown by the relief map, are on a higher level than the swale or depression west of town, so that water coming from Cemetery Hill in 1921 would, to a certain extent, be diverted by the raised ground of First and Second Avenues to the east and across the southern part of the town and into the creek near where Drake's barn stood and the balance would flow north along the swale to the railway embankment and then east along the low ground on the railway right of way to the viaduct and from there into the creek.

In a further attempt to show more water in Wibaux in 1921 than in 1929, Mrs. O'Keefe, a witness for the plaintiff, testified there was more water in the Davis Addition in 1921 than in 1929, and she pointed out to plaintiff's engineer Lyman the high water marks in 1921 in the Yuell house and in her house, both in the Davis Addition (R. pp. 73-79).

The admitted elevation of the front of the Yuell house and of the O'Keefe house is 2642.7 and 2640.7 feet respectively (R. p. 307).

As the undisputed evidence shows that the water in 1921 did not get onto Wibaux Street, with an elevation of 2635 feet, it is manifest that the water in the houses in 1921, referred to by Mrs. O'Keefe, could not be water from Beaver Creek, for if it had been the water would necessarily have been at least 5.7 feet deep on Wibaux Street in 1921.



The capacity of the railway bridge had nothing whatever to do with the water coming down Cemetery Hill and running through the town and coming down from Possum Hollow and flowing through the Davis Addition before it ever reached Beaver Creek where it could be carried away through the bridge.

Plaintiff also introduced, over objection of the defendant, evidence showing that the railway embankment was softened during the heavy rain at Wibaux and east thereof in 1921, and a locomotive of the defendant tipped over about three or four thousand feet east of the railway bridge and the track washed out at some points east thereof (R. pp. 85-87). This evidence was also being offered on the theory that the 1921 high water was such as to notify the defendant that its bridge was insufficient to properly handle the water in Beaver Creek. East of the town of Wibaux and particularly east of the railroad bridge there is high ground. The area to the east of this high ground is drained by a gulch, water from which empties into Beaver Creek north of the railway embankment. A culvert carries this gulch through the railway embankment or grade. The conditions in this gulch and surrounding the culvert have nothing whatever to do with the situation at the railroad bridge or the creek at the railroad bridge or to the south thereof. It may well be that the culvert was too small to carry the water that was brought to it by the gulch through the embankment. Assuming that the culvert, 4000 feet east of the bridge, carrying water from an entirely different drainage area, was too small, this fact, if it is a fact, would have no bearing whatever on the question of whether the bridge over Beaver Creek was adequate or not.

Mr. Paulson lived near the city water tank; no water got into his house in 1921. It did in 1929 (R. p. 512).

## THE AMOUNT OF THE WATER AND METHOD OF DETERMINING IT.

The number of cubic feet of water per second passing a given place is determined by ascertaining the area of a cross section of the high water and multiplying it by the velocity of the water in feet per second (R. pp. 311, 312, 650). For example, if the water was flowing 6 miles per hour the water would flow ( $1\frac{1}{2}$  times miles per hour gives feet per second, R. p. 301) 9 feet in a second. So if we assume an area of a cross section to contain 5,000 square feet, and that the water was flowing 6 miles per hour or 9 feet in a second, we would multiply 5,000 by 9. The result, 45,000, would be the cubic feet of water passing through a given cross section in a second. This is an accepted engineering fact. Both the engineer who testified for the plaintiff and the engineer who testified for the defendant were in agreement as to this being the proper method of determining the number of cubic feet of water per second (R. pp. 311, 312, 650, 790). Plaintiff's engineer, Mr. Lyman, used as a basis for his calculations a cross section made at a location west of the Massey place. The area of this cross section as computed by Lyman was 3774 square feet (R. p. 314). He estimated the velocity of the water as being 4.19 feet per second, or approximately 2.8 miles per hour (R. p. 312). This area did not include any water that flowed east of the Massey house. There was considerable swiftly flowing water east of the Massey house (R. p. 145). Multiplying the area, 3774 square feet, by the velocity he had determined, 4.19, Lyman secured a result of 15,800 (R. p. 314). This Mr. Lyman figured as the flow passed Massey's house. Instead of using 15,800 cubic feet of water per second, he thereafter referred to the result of his computations in round numbers as approximately 16,000 (R. p. 301).



If the engineers agree as to the method of computation, as they did in this case, how then could one get a result of 16,000 cubic feet per second and the other more than 30,000 cubic feet of water per second, as did defendant's engineer (R. p. 649). The answer is, of course, a different velocity was used by the different engineers. What was correct?

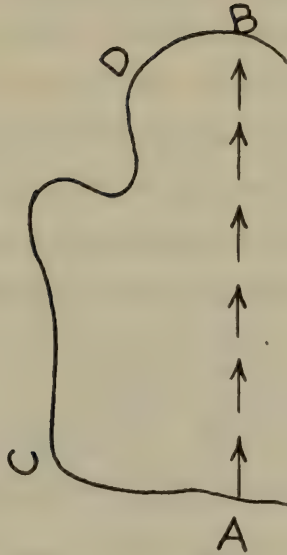
Mr. Lyman, plaintiff's engineer, ascertained the velocity he used by computations based on engineering formulae exclusively (R. pp. 314, 313). He conceded that an engineer should not use formulae "if he has other data" (R. p. 289). In this case other data was available to Mr. Lyman. Mr. Massey, a witness for the plaintiff, observed debris being carried in the water and past his place that was moving "quite fast. I would think it would be going faster than a man would ordinarily walk" (R. p. 413). Notwithstanding his statement about the use of other data, Lyman said: "In arriving at my computations I am absolutely ignoring Mr. Massey's testimony" (R. p. 313).

The court will take judicial notice of the fact that a man ordinarily walks at a rate better than 3 miles per hour. *Kovich v. Monongahela Ry. Co.* (Penn.), 154 Atl. 705, 706. So that when Mr. Massey said the water was moving "quite fast, *faster* than a man would ordinarily walk" he made it clear that the water was moving *faster* than 4 miles per hour. In addition Jean Weber, a witness for the plaintiff, saw the Methodist parsonage floating. She testified the parsonage was moving at a rate of from 4 to 5 miles per hour (R. p. 69). If we average the testimony, taking the most favorable view possible from the plaintiff's standpoint of this testimony, it is clear that the water was flowing at least as fast as  $4\frac{1}{2}$  miles per hour, or 6.7 feet per second. Multiplying 3774 square feet, the area of the cross section, by 6.7 the velocity of the water, we



get a result of 25,286. So it is clear that on Lyman's own theory more than 25,000 cubic feet of water per second flowed west of Massey's place, to say nothing of the water that flowed east of the Massey house.

At another time Mr. Lyman testified that the velocity of the water at Massey's place was 8 miles per hour. Eight miles an hour is 12 feet per second.  $3774 \times 12 = 45,288$  (R. p. 318). If the engineering formulae are used correctly, a similar result will be obtained. Mr. Lyman testified that he determined the velocity by using the Chezy and Kutter formulae. That to use these formulae it is necessary for the person using the same to determine the slope of the water. In ascertaining the slope Lyman said "I used the meandering distance. By meandering distance I mean the distance around that the stream ordinarily—the depth of the channel of the stream" (R. p. 317). Mr. Massey, plaintiff's own witness, testified that on the day of the flood the stream was not following its ordinary course, but was flowing in a line from his place to a point about half way between the city water tank and the Miller house. By looking at the exhibit, the relief map, or a glance at the sketch inserted in this brief, the court will see that Lyman brought about a distorted result by getting his slope from the meandered ordinary course of the creek instead of using the course that the stream was following at the time of the flood. To illustrate, instead of getting his slope by taking the line of the water A B, Lyman used the line A C D B. The greater distance of line A C D B over line A B obviously gave a different factor and enabled Lyman to compute a lower result.



Mr. Lillis testified that the proper method of determining the slope was to measure the surface of the water at two different points. This was obviously correct because then holes or unusual conditions in the bottom of the creek would not distort the results (R. pp. 650, 651). Mr. Lyman used the bottom of the creek (R. p. 315), thereby further distorting the result.

Assuming for the sake of argument that plaintiff's expert Lyman was correct and that the maximum flow of water in 1929 was 16,000 cubic feet of water per second, the flood of 1929 nevertheless was an unprecedented one that defendant could not in the exercise of ordinary care be expected to guard against. The highest known water prior to 1929 was in 1921 when the maximum flow was 10,000 cubic feet of water per second. So if we accept Lyman's figures the 1929 water was 6,000 cubic feet of water per second or 45,000 gallons of water per second greater than any known prior water. The difference between 10,000 and 16,000—6,000—is 60% of 10,000. So if we assume Lyman's altered testimony to be correct the 1929 flood was 60% greater than any previously known high water. We submit a flood 60% greater than any previously known

high water constituted an unprecedented flood that defendant could not in the exercise of ordinary care be expected to guard against.

The impeachment of Lyman, by his own testimony given on another occasion where he admitted that the flow of water in 1929 was more than 30,000 cubic feet per second, is set forth later in this brief commencing at page 62.

THE COUNTY BRIDGE BECAME BLOCKED DAMMING UP THE WATER  
AND CAUSING AN OVERFLOW BEFORE THE WATER REACHED  
THE RAILROAD BRIDGE.

Before the water flowing in the stream would reach the railroad bridge it would first reach the county highway bridge on First Avenue South. According to plaintiff's expert this county bridge had an opening of only 920 square feet (R. p. 280). The railroad bridge had an opening of 1190 square feet, according to Lyman, and 1320 square feet, according to Clements (R. pp. 311, 591). The opening of the county bridge was blocked so that little water was passing through it. Trees, boards, trash, chicken coops and all kinds of small buildings lodged against the county bridge closing the bridge opening (R. pp. 445, 446). Inasmuch as the water reached the county bridge before it reached the railroad bridge the overflow would take place *before* the water ever reached the railroad bridge.

THE FLOOD SWEPT THROUGH THE TOWN AND ON TO PLAINTIFF'S  
PLACE OF BUSINESS BEFORE IT REACHED THE  
RAILROAD BRIDGE

Both Mr. Lyman, plaintiff's engineering witness, and Mr. Massey, a witness for the plaintiff, conceded that west of the Massey house (3700 feet south of the railroad embankment) the flood water extended at least 600 feet in width



(R. pp. 313, 145). At this place the water was  $14\frac{1}{2}$  feet deep (R. pp. 307, 313). Mr. Massey testified that this water moved straight across the low land and that the direction of the flow of the water was about half way between the city water tank and the Miller or so-called "green house" (R. p. 142). Obviously water 600 feet in width and  $14\frac{1}{2}$  feet in depth rushing from the Massey place directly on to the town of Wibaux would flood the town unless something stopped it. A glance at the relief map shows there was nothing to stop this water, and that a converging of the water similar to that at Masseys would necessarily follow. The water would necessarily sweep into the town. The creek bank between the city water tank and the Miller house was only 7 feet high. The water, which was 600 feet in width and  $14\frac{1}{2}$  feet deep at Massey's was on the same plane as the *top* of the bank of the creek near the town. Just how much water the depression consisting of the creek bed would divert is, of course, problematical, but it would certainly follow that a great amount of that water would rush into the town. As Mr. Lillis, defendant's engineering expert, put it, there was nothing else the water could do but rush into the town (R. p. 652). Plaintiff's expert, Mr. Lyman, admitted that some of this water would enter the town at the swale located near the city water tank (R. p. 134). The city water tank and the Miller house referred to being approximately 1300 feet south of the railroad embankment, and plaintiff's store being approximately 600 feet south of the railroad embankment, it follows that the water flooded the town and plaintiff's store before it ever reached the railroad embankment.

Mr. Zinda lived on the south edge of town about half way between the city water tank and the Miller house. On the morning of the day of the flood he saw water coming from the

south moving north around his house. The water then was about 6 inches deep (R. p. 639). He started his automobile to make his "get-away" and drove the car in front of the house. He testified as follows:

"\* \* \* a rush of water come and flooded the engine. That water came from the south. As to the depth of that water, that was about a three-foot wave. I couldn't give you any idea as to the width of that wave. This wave got to my engine and the engine died. I didn't get it started again; I didn't even try; I got out and started to wade out. After the flood was over, I found my automobile. It wasn't just where I left it; it was moved north I would judge about 50 feet.

"Q. When you left the automobile that morning, how was the car standing with reference to the creek? Was it parallel to the creek or right-angles to the creek, diagonal to the creek, or—

"A. The car was standing east and west. When I found it, it was headed south and north. When I abandoned the car that morning, I had it in low; when the wave hit there, I didn't stop to take it out of gear,—I left it as it was and got out of there. I started for right straight for the church there, northeast. I was going to go to the railroad 'dump', if I could make it—the railroad 'dump'—the grade; that is, up high there where the main line is. I went to over Pickering's pool hall there, in the rooms.

"I observed conditions there that day in Wibaux; I was looking out of windows on the north side. On my way down to the Pickering pool hall, with reference to there being or not being any water in the town of Wibaux, will say that it got shallower there; it was shallower when I got to the pool hall there—shallower than where I left. The water I encountered there was moving north" (R. pp. 640, 641).

Early in the day Mr. Rowe saw water sweep over the low ground between the Massey place and the town. "Those waves came right on over north towards the town of Wibaux" (R. p. 751).

Mr. Paulson lived in a house located near the city water tank (R. p. 511). He and his family were trapped in their house. They tried to get away but the water flowing from the south to the north was too deep (R. pp. 513, 514).

THE RAILROAD EMBANKMENT WAS WASHED OUT SO AS TO  
CREATE ADDITIONAL WATERWAYS.

Mr. Pickering, a witness for the plaintiff, saw the embankment break out and said that it kept crumbling (R. p. 56).

William Lentz, a witness for the plaintiff, testified that by 10 o'clock the embankment had gone out on both sides of the bridge (R. p. 149).

W. C. Howard, a witness for the plaintiff, saw the railroad embankment give way (R. p. 229).

Mr. Stark, a civil engineer, viewed the bridge at a time when 75 feet of the railroad embankment had washed out west of the bridge and 100 feet east of the bridge. At that time the high water extended as high as the ground on the west and the whole country was covered with water at that time (R. p. 507).

Mr. Zinda testified that the second and greatest raise of water came *after* the embankment was out (R. p. 641).

Mr. Pickering, a witness for the plaintiff, testified that *after* the railroad embankment had gone out the water went down and then rose again (R. p. 63).

Plaintiff tried the case on the theory that the defendant should have provided a longer bridge so that a greater waterway would have been created. *The washing out of the embankment created this situation and yet the whole town was flooded.*



## HISTORY AND DEVELOPMENT OF THE BRIDGE.

The first railway bridge over Beaver Creek was built in 1880, and a model of this bridge and models of the later bridges, constructed on a scale of 1 inch equals four feet, were introduced in evidence, and certified to this Court by the trial court as exhibits (R. p. 576). The first bridge was a pile trestle timber bridge, 137 feet long (R. p. 579), and was the usual type of bridge used in the first construction of a railroad across the country (R. p. 577). After the railroad was completed to the coast, and long timbers were available, three bents of this trestle bridge standing in the channel of the stream were removed in 1884 and a pony Howe truss 44 feet long placed over the channel of the creek to eliminate the accumulation of drift that might come down the creek and lodge against the bents in the creek channel (R. p. 579). In 1896, this Howe truss bridge, with the bent trestles at the end thereof, was removed and a permanent steel bridge put in. This consisted of a central span 70 feet long resting on concrete piers and at each end thereof a 20 foot steel span, the outer end resting on pile abutments. The track was raised  $3\frac{1}{2}$  feet at that time, so that the bottom of these steel girders would be as high as the bottom of the former Howe truss bridge (R. p. 580). From the top of the outer ends of the two 20 foot spans, there was a slope towards the base of the concrete piers supporting the 70 foot span (R. p. 581). See model of this bridge introduced in evidence (R. p. 576).

In determining the size of this permanent steel bridge, all available information as to past high water, cloudbursts, etc. was considered (R. pp. 581, 582, 615 & 711).

The steel bridge, as constructed in 1896, would carry about 22% more water than the former timber bridge at the same elevation of high water as in 1893 and 1897 (R. pp. 583-584).

In 1898 the Railway Company, in order to reduce the grade over Beaver Hill, located just west of Wibaux, raised its track a little over five feet and also raised the 70 foot and two 20 foot steel girders to correspond by adding to the height of the piers and abutments already there (R. p. 584). See model of this bridge.

This raise in 1898, of course, further increased the capacity of the bridge so that it then had a capacity about double that of the Howe truss bridge that was built in 1884 (R. p. 588).

In 1903, the pile abutments at the outer ends of the two 20 foot spans were replaced by concrete abutments without otherwise changing the bridge, which remained at that height and width until the flood of June 7, 1929 (R. pp. 586-587).

This bridge model has a wire along its side showing the high water elevations in 1893 and 1897, which were the same (R. p. 585); also a second wire representing the high water mark of 1921 and a third representing the high water mark of 1929 (R. p. 588).

The elevation above sea level at a point directly under the railway bridge is 2620 feet, according to the datum point of Engineer Oien (R. p. 570).

According to Engineer Lyman, the datum point taken by him beneath the bridge about two years later was 2 feet higher, or 2622 feet, probably due to the fact that the bed of the creek had filled in some after the flood of 1929 (See Oien's testimony, R. pp. 272 & 565, Lyman's testimony, R. p. 275).

Lyman, at various places in his testimony, in giving elevations around Wibaux, states that the elevation was so many feet above point "B", and point "B", as thus used by him, is his datum point under the railway bridge, but Mr. Lyman, in thus giving elevations, decided to use Oien's datum point of 2620, so in giving the elevation of Main Street at First Avenue

South, he gives it as 15 feet higher than point "B" (R. p. 572), which makes it the same elevation as that given by Oien of 2635 feet above sea level.

#### ACT OF GOD.

A flood does not necessarily have to be the only flood of somewhat similar character in the history of a stream in order to classify it as "an act of God" or to make it one which a party cannot reasonably anticipate. See the following cases:

*Central Trust Co. v. Wabash, etc. Ry. Co.*, 57 Fed. 441;

*Pearce v. Newton*, 41 Fed. 106;

*Eagan v. Central Vt. R. Co.*, 69 Atl. (Vt.) 732;

*Chicago R. I. & P. Ry. Co. v. Turner*, 284 Pac. (Okla.) 855;

*Velty v. Vulgamore*, 24 Ohio C. C. 572, Affirmed, without opinion, in 67 N. E. (Ohio) 1103;

*Norris v. Savannah, etc. Ry. Co.*, 1 So. (Fla.) 475;

*Inhabitants of Palmyra v. Woolen Mills*, 58 Atl. (Me.) 674;

*People v. Utica Cement Co.*, 22 Ill. App. 159;

*Director General of Railroads v. Bryant's*, 105 S. E. (Va.) 389;

*Pittsburgh, etc. Ry. Co. v. Gilleland*, 56 Penn. 445, 94 Am. Dec. 98;

*Diamond Match Co. v. New Haven*, 13 Atl. (Conn.) 409;

*Kansas City, etc. R. Co. v. Smith*, 17 So. (Miss.) 78;

*Borchardt v. Wausau Boom Co.*, 11 N. W. (Wis.) 440;

*Greiner v. Alfred Struck Co.*, 171 S. W. (Ky.) 405.

In *Heckaman v. N. P. Ry. Co.*, 93 Mont. 363, 20 Pac. (2d) 258, involving this same flood, the Supreme Court of Montana found this was an unprecedented flood.



In the following cases, where the evidence as to the unprecedented character of the flood was not as strong as in this case, the court either sustained directed verdicts for the defendant, based on that defense, or held they should have been granted:

*Eagan v. Central Vt. R. Co.*, 69 Atl. (Vt.) 732;  
*Chicago R. I. & P. Ry. Co. v. Turner*, 284 Pac. (Okla.) 855;  
*Louisville & N. R. Co. v. Conn.*, 179 S. W. (Ky.) 195;  
*Wm. Tackaberry Co. v. Simmons Whse. Co.*, 152 N. W. (Ia.) 779;  
*Alt v. C. B. & Q. Ry.*, 148 N. W. (Neb.) 900;  
*Central Trust Co. v. Wabash St. Ry. Co.*, 57 Fed. 441;  
*Brown v. Chicago, B. & Q. R. Co.*, 195 Fed. 1007;  
*Sherwood v. St. Louis, etc. Ry.*, 187 S. W. (Mo.) 260;  
*Peel v. Chicago, M. etc. R. Co.*, 94 Mont. 334, 22 Pac. (2d) 617.

The cases of *Central Trust Co. v. Wabash, etc. R. Co.*, and *Louisville & N. R. Co. v. Conn.*, just cited above, are well considered cases on facts very similar to those in the case at bar, and are both cited with approval by this court in

*Eikland v. Casey*, 290 Fed. (9th Cir.) 880.

## II.

### NO EVIDENCE OF NEGLIGENCE.

The Railway Company was expressly authorized by statute to construct and maintain railway grades or embankments and bridges.

Section 6507, Revised Codes of Montana of 1921, provides:

“Every railroad corporation has power:

\* \* \* \* \*

“4. To lay out its road, not exceeding in width one hun-

dred feet on each side of its center line, unless a greater width be required for the purpose of excavation or embankment, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same;"

By Sections 2 and 7 of Act of Congress, July 2, 1864 (13 U. S. Stat. 365), authority was granted to build the railroad line.

Section 8645, Revised Codes of Montana of 1921, provides:

"Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

So, there was no trespass or nuisance *per se* in constructing the embankment and bridge on defendant's right of way, and it follows that there was no violation of duty to the owners of abutting land or infringement of their rights unless they prove it was because of negligent construction or maintenance of the embankment or bridge, and the defendant is *not an insurer* against damage therefrom, but can be held only for failure to exercise ordinary care.

*Bray v. Cove Irr. Dist.*, 86 Mont. 562, 284 Pac. 539;

*Jeffers v. Montana Power Company*, 68 Mont. 114, 217 Pac. 652;

*Eikland v. Casey*, 290 Fed. (9th Cir.) 880;

*Central Trust Co. v. Wabash, etc. Ry. Co.*, 57 Fed. 441.

The complaint alleges and it was necessary for plaintiff to prove that the bridge, as it existed in 1929, was insufficient to properly handle the "ordinary seasonally recurring high water" flowing in said stream prior to June 7, 1929.

The bridge, as finally constructed in 1898, had a greater capacity than the prior bridges existing there from 1881 to 1898 (R. pp. 581, 582 & 588).

If the bridges were sufficient to handle such ordinary high water as could be reasonably anticipated for 48 years, as they did from 1881 to 1929, without damage to property in Wibaux, and particularly to the property where plaintiff had his business in 1929, then they were sufficient bridges so far as plaintiff is concerned, and defendant cannot be held liable to plaintiff for the damages in 1929, if the flood of that year was unprecedented.

As shown above under heading "The Flood in Question Was Unprecedented," the highest water prior to 1929 was in 1921. It did no material damage to property in Wibaux. In other words, the bridges over Beaver Creek prior to 1929 did *properly handle the ordinary high water flowing in said stream*.

So plaintiff failed to prove, by any substantial evidence, the allegation of his complaint that the bridge was insufficient to handle the "ordinary seasonally recurring high water".

He also failed to prove his allegation that the defendant knew, or should have known, that a flood the size of the 1929 flood would arise in the ordinary course of nature, as the evidence clearly shows that there was nothing to indicate to defendant that there would be a number of cloudbursts in Beaver Creek valley, occurring at such a time that their *combined volume* would reach Wibaux as it did in 1929.

He also failed to prove his allegation that in June, 1921, and in other years, floods had occurred "causing rise of water *within six inches* as high on *defendant's said embankment* as that of June 7, 1929" (R. p. 5).

The undisputed evidence shows that the water in 1929 was 8.2 feet higher on *defendant's embankment* than in 1921, with no change in bridges.



## RESTORING THE STREAM AS NEAR AS MAY BE.

Plaintiff, through his expert Lyman, attempted to show, in support of his allegations of negligence, that the channel of the stream was much wider than the railway bridge and that, therefore, the stream had not been restored to its former state of usefulness as near as may be and that defendant thereby violated the provisions of Section 6507 Revised Codes of Montana, 1921, which provides:

“Every railroad corporation has power \* \* \*: 5. To construct their road across, along or upon any stream of water, water course \* \* \* which the route of its road intersects, crosses or runs along, in such manner as to afford security for life and property; but the corporation shall restore the stream or water course \* \* \* thus intersected to its former state of usefulness as near as may be, or so that the railroad shall not unnecessarily impair its usefulness or injure its franchise;”

As the evidence shows the railway bridges, as constructed, did handle in a proper manner all high water from 1881 to 1929, we submit that such fact, if it is a fact, is immaterial.

However, the evidence does show that the stream was restored, as near as may be, and that the bridge was as wide as the normal creek channel.

Lyman did not examine conditions at Wibaux until 1931 (R. p. 265), two years after the flood of 1929, which, of course, materially changed the channel in many places. His testimony is based largely upon conditions he found after the new bridge was built in 1929, and the old piers and abutments had been blown out. He referred to an old profile map of the defendant, Plaintiff's Exhibit No. 26 (R. p. 276) and from his interpretation of this profile, testified:

“To get anything like a flood flow, the banks are about 600 feet wide at this point. About a 10 or 11-foot flow

would show banks of 600 feet wide in the banks at the time the profile was made" (R. p. 277).

Of course, a flood 10 or 11 feet deep would overflow the banks of a normal creek channel, which channel has an elevation of 2620 feet at a point beneath the railway bridge (R. p. 305) and cover the low land south of the railway bridge (R. p. 250), mostly owned by the Railway Company as shown by the black lines on the relief map (R. pp. 60, 560 & 561). A 10 or 11 foot flood would come up against the bank of the benchland or level on which the buildings of the town stand, with an elevation of 2635 feet, and lack 3 or 4 feet of reaching the level of the town. In other words, according to Lyman, if a stream overflows its banks and spreads to the foothills on each side of the valley such foothills become the *normal* banks of the stream.

Lyman, on rebuttal, testified that in his opinion the channel was narrowed by the bridge from 170 feet to 65 feet (R. p. 786). At what point did Lyman find a 170 foot channel? Was it at some bend in the creek where the channel had been widened by erosion? The inconsistency in and conflicting statements of this witness will be discussed later, under the heading "Plaintiff's Case Was Based Upon Opinion of Witness Lyman," etc.

That Lyman's interpretation of the profile map (Plaintiff's Exhibit 26) is erroneous, was pointed out by Mr. Clements, Bridge Engineer (R. pp. 598-602), and Engineer Darling (R. p. 714), who approved the plan for the bridge built in 1896 (R. p. 709).

In a crooked stream flowing through a valley like Beaver Creek, the width of the channel of the stream will vary considerably due to the fact that where the stream bends one bank is constantly eroded, leaving low ground or sand bars oppo-



site thereto and at such points the width between banks constantly becomes wider, while the stream, for most of the year, only covers a small portion of this widened channel lying next to the bank that is being cut away. This process was clearly explained by Engineer Clements (R. pp. 601-602) and by Engineer Darling (R. p. 714). Counsel for plaintiff called Mr. Oien, defendant's engineer, to the stand and he testified:

"The width of the channel of the stream at the closest measurement that I made north of the bridge, *at that particular point*, was approximately 170 feet" (R. p. 295).

He did not show how far north of the bridge this measurement was made or whether at a bend in the creek where erosion had occurred.

Later Mr. Oien testified:

"In connection with the surveys to which I have already testified in connection with the examination at Wibaux and vicinity, I examined Beaver Creek and the country to the south of Wibaux. As to what the average width of Beaver Creek is between the banks where the banks are clearly defined, will say that where the banks are well defined and the creek fairly straight,—no erosion going on, so to speak, the width is from 65 to 70 feet. As to the character of the volume of water ordinarily that passes down Beaver Creek,—low water, there is very little, just a trickle" (R. p. 549).

Near the point where E Street intersects with Beaver Creek, Oien took a cross section (Defendant's Exhibit 18, R. p. 533), and the width of the stream bank to bank at that point was 72 feet, or from top of bank to top of bank 85 feet (R. p. 554). A cross section taken at Massey's ranch (Defendant's Exhibit 17, R. p. 554) shows the width of the banks there was 78 feet (R. p. 555). Both these cross sections were taken at points where



the creek bends, as shown by the relief map and there would be more or less erosion.

Mr. Woodard, who lived at Wibaux from 1909 to 1923, and who worked for the State of Montana for a number of years adjusting losses from hail, and was also manager of an elevator situated just east of the railway bridge during the summer of 1909, and walked over this bridge at least four times a day during that summer, testified:

“In regard to the channel of the stream as it passed under the bridge, that channel of the stream as compared with the bridge at that time, was about the same width I think” (R. p. 735).

The pile bents were removed from the channel of the stream in 1884 to clear obstructions in the stream and a 44-foot Howe truss bridge built over the channel (R. pp. 578-579). This shows that the width of the creek channel at that time was about 44 feet.

Mr. Kinney, a witness for plaintiff, who lived in Wibaux continuously from 1890 to 1915, and during that time was first a cow puncher, then in the grocery and meat business, ran a barber shop, livery stable and finally built a bank in 1906, which he ran until 1915 (R. p. 243), and who was also state senator from Wibaux County from 1914 to 1921, and a member of the city council from 1911 to 1915 (R. p. 248), testified:

“In ordinary times when there was no high water, I would say that the channel of Beaver Creek is only twelve or fifteen feet wide, and of course, this low ground of fifteen to twenty-five acres out south of the bridge, after the high water receded, would be covered with gravel and sand and would be practically worthless ground” (R. p. 251).

Mr. Darling, one of the outstanding engineers of the country (R. p. 310, 597-598), and who approved the plans for the Beav-

er Creek bridge, providing for a 70 foot span and two 20 foot approach spans (R. p. 709), testified that the "N. P. records further show the banks of Beaver Creek to be *no greater* distance apart than 80 feet" (R. p. 714).

#### THE COUNTY HIGHWAY BRIDGE CONSTRUCTED IN 1907.

The County of Dawson constructed a highway bridge 600 feet south of the railway bridge, which bridge was *60 feet long* and 10 feet high, as alleged in paragraph V of defendant's answer (R. p. 35), and admitted in paragraph IV of plaintiff's reply (R. p. 41). This bridge was designed by Engineer Baer, who was County Surveyor of Dawson County in 1907, after making a study of conditions and past high water records (R. p. 501). This county bridge had a capacity of 920 square feet (R. p. 502), as compared to 1190 square feet for the railway bridge, according to Lyman (R. p. 311), and 1320 square feet according to Clements (R. p. 591). Baer testified:

"Applying my knowledge of engineering to the situation, I designed a bridge that was considered ample and adequate" (R. p. 502).

Several photographs introduced in evidence show the normal channel of the stream south of the railway bridge to be about the width of the bridge.

In *Heckaman v. Northern Pacific Railway Company, supra*, the court said:

"Within the meaning of statutes such as that under consideration, the 'water course' is defined as a channel cut by running water, with *well-defined banks* through which water flows for *substantial periods of each year*. (New Jersey, I. & I. R. R. Co. v. Tutt, 168 Ind. App. 205, 80 N. E. 420).

“The statute, however, does not require that the *full width of the channel be left open*, but only that the water course be restored to its original usefulness as near as may be.” (Italics ours). (p. 263).

The phrase “as near as may be” as used in subdivision five of Section 6507, Revised Codes of Montana, quoted above, has been frequently construed and does not mean “as near as may be possible” or “as near as may be practicable”, but what would be reasonably sufficient in the judgment of experienced engineers.

*Indianapolis, etc. R. Co. v. Horst*, 93 U. S. 291, 301, 23 L. Ed. 898;

*Mexican Central R. Co. v. Pinkney*, 149 U. S. 194, 205, 37 L. Ed. 699;

*Potter v. Robinson*, 40 N. J. Law, 114;

*Heckaman v. N. P. Ry. Co.*, 93 Mont. 363, 20 Pac. (2d) 258.

We submit that plaintiff has wholly failed to prove, by any substantial evidence, that the channel of the stream, as defined by the Supreme Court of Montana in the above quotation, was wider than 60 to 80 feet, or to prove that a bridge with a 70 foot span and two 20 foot spans, so constructed that half the area beneath the two 20 foot spans also handled high water, did not restore the usefulness of the stream as near as may be. There is no evidence that the usefulness of the stream for all purposes for which it was being used was not just as good or better after the bridge was built and the channel straightened and deepened, as explained by Mr. Kinney (R. pp. 243, 244, & 250), as it was before the bridge was built.

Engineer Clements testified that the stream was restored to its former state of usefulness as near as may be (R. pp. 594-595).

Engineer Darling also so testified (R. pp. 710-711).



Engineer Lillis testified that the conditions resulting from the flood would have been the same had there been no railroad embankment at Wibaux at all (R. pp. 653, 643, 646).

#### THE INADEQUACY OF THE BRIDGE NOT PROVEN.

That the bridge was adequate to handle the ordinary high waters is conclusively shown by the undisputed fact that from 1881 to 1929 it did handle such water without any material damage to any property in Wibaux, as is heretofore shown. The bridge, as constructed in 1896 and raised in 1898, carried over 22% more water than the earlier bridges (R. pp. 583-584 & 588).

A number of the best qualified bridge engineers in the country testified that the bridge, as constructed in 1896, was adequate and ample to handle all high water that could reasonably have been anticipated in Beaver Creek.

Engineer W. L. Darling who, since 1916, has maintained a private practice in St. Paul as consulting engineer, and who was an engineer for the Northern Pacific during the construction of the railroad through Montana and who, as its Chief Engineer, approved the plans for the 1896 bridge over Beaver Creek (R. p. 709), so testified (R. p. 710). Mr. Darling was selected as a member of the Advisory Commission by the United States Government and was sent overseas in connection with the rehabilitation of the Russian Railway System during the World War (R. p. 708).

Mr. Lyman admitted that Mr. Darling was a first-class engineer (R. p. 310).

Mr. M. F. Clements, a bridge engineer of wide experience, who among other projects designed the foundations for the Suisun Bay Bridge, now called the Martinez-Benicia bridge approximately thirty miles northeast of San Francisco, also

testified that the bridge in question was adequate (R. pp. 571, 572, 575, & 591).

Mr. Samuel Murray of Portland, Oregon, Chief Engineer of the O. W. R. & N., with over 30 years' experience in designing and locating bridges in the northwest (R. p. 697), so testified (R. pp. 698 & 702).

Mr. Bernard Blum, the present Chief Engineer of the Northern Pacific (R. p. 682), so testified (R. p. 688).

Engineer Baer testified that the 60 foot highway bridge, constructed in 1907, in his opinion "was ample and adequate" (R. p. 582).

Against this array of highly qualified engineers, and in the face of the history of said bridge from 1881 to 1929, the plaintiff had the testimony of Engineer Lyman, on rebuttal, who thought that the bridge was not adequate (R. p. 786).

The case of *Boston etc. Canal Co. v. Seaboard Trans. Co.*, 270 Fed. (1st Cir.) 525, Certiorari denied in 256 U. S. 692, is an instructive case on what constitutes negligence. In reversing a judgment for plaintiff, the court said that it was necessary for plaintiff to prove:

"That the danger of taking a vessel of that type into that canal was, before the accident, sufficiently obvious, so that men of ordinary prudence, with the knowledge that the canal officials then had concerning the currents in the canal and the steering qualities of vessels of this type, would not have permitted the attempt. It is not enough in the light of hindsight, to find that the canal officials and other prudent people would now conclude that vessels like the Chisholm should not make the attempt. \* \* \*

"Negligence is failure to conform to the standard of the reasonably prudent man. Broadly speaking, it is departure from the normal, or what should be the normal.

\* \* \*

“Obviously, when prudent and careful men, equally competent to judge of a difficult and doubtful situation, hold diametrically opposite views as to which of two courses is safer, it cannot be negligence to adopt either course. In such cases, there is no normal from which to depart” (p. 529).

So here, the evidence shows that prudent, careful men and engineers competent to judge of the sufficiency of a bridge to handle high waters had considered this bridge sufficient for forty-eight years, and it had been sufficient for that time. The only evidence to the contrary is the opinion of Lyman after an unprecedented flood had caused damage.

### III.

#### NO EVIDENCE OF ACTIONABLE NEGLIGENCE.

This question is presented by Specifications of Error Nos. 1 & 2.

Subdivision 5 of Section 6507 of the Revised Codes of Montana of 1921, quoted above, which was enacted in the year 1895, provides that when a railroad intersects a stream it shall restore the stream “to its former state of usefulness as near as may be.”

This statute has been construed by the Supreme Court of the State to require only reasonable and ordinary care. The defendant was not required to anticipate an act of God and provide against such an occurrence.

*Lyon v. Chicago, etc. R. Co.*, 45 Mont. 33, 121 Pac. 886;  
*Peel v. Chicago, etc. Ry. Co.*, 94 Mont. 334, 22 Pac. (2d)  
 617;

*Heckaman v. N. P. Ry. Co.*, 93 Mont. 363, 20 Pac. (2d) 258.



The statute is for the benefit of those who might be injuriously affected by the failure to perform the duty imposed.

It is not a question of whether the stream was restored to its former state of usefulness, but the question for determination is whether the restoration was such as to discharge the *duty owing to the plaintiff*. The plaintiff cannot complain except of negligence affecting him or his property. In other words, it was necessary for the plaintiff to allege and prove *actionable negligence*.

In 45 Corpus Juris, page 631, it is said:

“*Actionable Negligence*. Even though an act or omission may involve a lack of care and thus constitute negligence in the colloquial meaning of the term, it does not necessarily follow that any cause of action arises therefrom. To constitute actionable negligence there must be not only a lack of care, but such lack of care must involve a breach of some duty owed to a person who is injured in consequence of such breach.”

In the same volume, at page 647, it is said:

“In order that one may be held liable for negligence, it is essential that the duty breached by him should have been a duty which he owed to the person injured in person or property by the breach. The mere fact that the act or omission complained of involved a breach of duty owed to some person or persons other than the complaining party does not give the latter any right of action.”

In the case of *Savings Bank v. Ward*, 100 U. S. 195, the court, referring to cases which are cited and discussed, said:

“They show to a demonstration that it is not everyone who suffers a loss from the negligence of another that can maintain a suit on such grounds. On the contrary, the limit of the doctrine relating to actionable negligence, says Beasley, C. J., is, that the person occasioning the loss must

owe a duty, arising from contract or otherwise, to the person sustaining such loss" (p. 202).

The principle stated in the foregoing quotation was recognized and applied in the case of *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. Ed. 1291. In that case a recovery was sought for personal injuries resulting in death occasioned by the collision between a switch engine and a freight car which was not equipped with a coupler and a drawbar on the end which collided with the switch engine, as required by the Federal Safety Appliance Act. There was evidence that if the freight car had been so equipped, the equipment would have kept the switch engine and the car sufficiently apart to have prevented the injury. The negligence charged was the failure to have the freight car equipped with an automatic coupler and a drawbar of standard height, as required by the Federal Safety Appliance Act. The court said:

"We are of opinion that the deceased, who was not endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar *operated as a breach of a duty imposed for his benefit*, and that the Supreme Court of the State erred in concluding that the Safety Appliance Acts required it to hold otherwise." (Italics ours) [p. 250, 251].

In the case of *Berlin Mills Co. v. Croteau*, 88 Fed. 860, 862, decided by the Circuit Court of Appeals for the First Circuit, the Court said:

"In determining whether the defendant is negligent, in a given case his duty to the plaintiff at the time is to be considered, and not his general duty, or his duty to others."

In *Bray v. Cove Irrigation District*, 86 Mont. 562, 284 Pac. 539, the court said:



“The defendants are *not insurers* against damage, but can be held only for failure to exercise ordinary care in the construction and operation of their plant. *Jeffers v. Montana Power Co.*, 68 Mont. 114, 217 Pac. 652. *Actionable negligence* arises only from a breach of legal duty, and to state a cause of action for damages resulting from negligence it is necessary that the complaint disclose the duty, the breach, and the resulting damages. Facts, and not legal conclusions, must be stated, and the complaint must set forth sufficient facts from which it can be said, as a matter of law, that the *defendant owed to the injured party a duty* arising from some legal relation existing at the time of the injury.” (Italics ours) [p. 540].

See also :

*Fusselman v. Yellowstone Valley L. & I. Co.*, 53 Mont. 254, 163 Pac. 473;

*Jonosky v. N. P. Ry. Co.*, 57 Mont. 63, 187 Pac. 1014;

*Cleveland, etc. Ry. Co. v. Wisehart*, 67 N. E. (Ind.) 993.

There is no evidence that the property of the plaintiff, which he occupied on June 7, 1929, and involved in this case, was ever damaged by water from Beaver Creek prior to that date, and it appears from all the evidence that the plaintiff's property would not have been damaged except for the *unprecedented flood* which occurred on that day. It necessarily follows that the duty of restoration of the stream or water course, required by the statute, was fully performed as to the property of the plaintiff.

It will, undoubtedly, be contended, in behalf of the plaintiff, as it was in the lower court, that the case of *Heckaman v. Northern Pacific Railway Company*, *supra*, which involved the same flood, should be accepted as a controlling authority in the decision of this case. That case, of course, was decided upon a different record and, furthermore, the question of lia-



bility presented in this case is one of general law, in the decision of which the Court is not bound by the decision in the *Heckaman case*.

In pointing out that Federal courts are not bound by decisions of the state court in deciding questions of general law, but are free to exercise their own independent judgment, the Supreme Court of the United States said:

“As respects the rule of decision to be followed by federal courts, distinction has always been made between statutes of a State and the decisions of its courts on questions of general law. The applicable rule sustained by many decisions of this Court is that in determining questions of general law, the federal courts, while inclining to follow the decisions of the courts of the State in which the controversy arises, are free to exercise their own independent judgment. That this case depends on such a question is clearly shown by many decisions of this Court. *Swift v. Tyson*, 16 Pet. 1, 19, was an action on a bill of exchange. Mr. Justice Story, writing for the Court, fully expounded § 34 of the Judiciary Act. \* \* \* *Railroad Company v. Lockwood*, 17 Wall. 357, 366, *declined to follow the state rule as to liability of common carriers for injury of passengers. Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 443, held a question concerning the validity of a contract for carriage of goods is one of general law. *Baltimore & Ohio Railroad v. Baugh*, 149 U. S. 368, 370, *so held as to the responsibility of a railroad company to its employees for personal injuries. Beutler v. Grand Trunk Railway*, 224 U. S. 85, 88, *decides who are fellow-servants as a question of general law.*” *Black and White Taxicab and Transfer Company v. Brown and Yellow Taxicab and Transfer Company*, 276 U. S. 518, at pages 530 and 531. (Italics ours.)

In the *Heckaman case*, the Court fails to distinguish between general negligence and negligence in failing to perform

a duty owing to the plaintiff. The Court stated that the evidence was sufficient to support a finding that there was a "violation by the defendant of the mandate of Section 6507 above, in that the defendant did not restore the stream to its original usefulness as near as may be."

The court then said :

"This antecedent and concurrent negligence is shown, and, as above pointed out, the evidence clearly shows that the damage done the plaintiff was 'in whole or in part', and perhaps wholly, due to this negligence. It follows that the fact that the flood of 1929 was unprecedented is no defense, \* \* \*." (p. 265).

It thus appears that the *Heckaman case* was decided upon the assumption that there was negligence in failing to restore the stream as required by the statute, and that this negligence, concurring with the act of God, rendered the defendant liable. Whether the stream was restored to its original state of usefulness, so far as the property of the plaintiff in that case was concerned, was not considered.

The Supreme Court of the State in the *Heckaman case* adopted the same view as did the Supreme Court of Arkansas in the case of *St. Louis & S. F. R. Co. v. Conarty*, 155 S. W. 93, which was rejected by the Supreme Court of the United States in 238 U. S. 243, as already shown. The Supreme Court of Arkansas in that case said :

"The evidence establishes the fact that the injury to deceased would not have occurred but for the absence of proper equipment. That was the direct cause of the injury, notwithstanding the collision" (p. 95).

The Supreme Court of the United States decided that although the injury would not have occurred except for the negligence in failing to comply with the Safety Appliance Act by



providing proper equipment, there was nevertheless no liability for the reason that such failure was not a violation of a duty owing to the deceased, or, in other words, actionable negligence.

#### IV.

#### PROXIMATE CAUSE AND CONCURRING NEGLIGENCE.

The fact, if it be a fact, that the stream was not restored to its original state of usefulness, generally speaking, and that the damage suffered by the plaintiff was greater than it would have been if there had been no railway bridge or embankment, does not establish a liability against defendant, provided the plaintiff would not have suffered any damage *except for the unprecedented flood* or act of God.

Under such circumstances, it is the act of God and not the situation or *condition* which may have been negligently created that constitutes the proximate cause of the damage.

In the case of *Memphis & Charleston R. R. Co. v. Reeves*, 10 Wall. 176, which involved a destruction of property by an unprecedented flood or freshet, the court decided that the act of God was the proximate cause of the damage, notwithstanding it appeared that the property was negligently placed within the range of the destructive force.

In the case of *St. Louis I. M. & S. R. Co. v. Insurance Co.*, 139 U. S. 223, which involved the question of liability for the destruction of cotton by fire and it appeared that the cotton would not have been burned except for the negligent delay of the railway company in furnishing transportation, the court said:

“The delay of the defendant railway company to furnish transportation according to its contract with the com-



press company was in no legal sense a cause of the destruction of the cotton. It was simply one of a series of *antecedent events without which the loss could not have happened*, for, if the cotton had not been there, it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, and in no way arising from or connected with the neglect of the defendant to furnish transportation. Upon principle and authority, that neglect was not the direct and proximate cause of the loss by fire, and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers." (Italics ours) (p. 237).

In the case of *St. Louis & S. F. R. Co. v. Conarty*, 238 U. S. 243, 59 L. Ed. 1291, hereinbefore cited, in which a recovery was sought for injuries sustained by the collision between a switch engine and a freight car, which was not equipped with an automatic coupler and drawbar as required by the Federal Safety Appliance Act, and which if it had been so equipped would have prevented the injury, the court said:

"It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, (referring to the Federal Safety Appliance Act), but only that had they been complied with it would not have resulted in injury to the deceased." (p. 249).

For the same reason that the failure to comply with the Federal Safety Appliance Act was not the proximate cause of the collision in the above cited case, the failure of the defendant in the instant case to fully perform the statutory duty of restoring the stream, if there was any such failure, was not the proximate cause of the flooding of the plaintiff's property.

The case of *Cole v. German Savings & Loan Soc.*, 124 Fed. (8th Cir.) 113, 64 L. R. A. 416, is a leading case on the ques-

tion of proximate cause, *and when prior negligence cannot be considered as concurring negligence.* In that case, the court said:

“An injury that is the natural and probable consequence of an act of negligence is actionable, and such an act is the proximate cause of the injury. But an injury which could not have been *foreseen nor reasonably anticipated as the probable result of an act of negligence* is not actionable, and such an act is either the remote cause, or no cause whatever, of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that would not have resulted from it, *had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course,* and produced it, is not actionable. Such an act of negligence is the remote, and the independent intervening cause is the proximate, cause of the injury. \* \* \*

\* \* \* \* \*

“\* \* \* A negligent act from which an injury could not have been foreseen or reasonably anticipated is too remote in the line of causation to sustain an action for an injury in every case, *and the concurring negligence of another cannot make it less remote,* nor charge him who committed it with responsibility for it to which he would not have been liable to answer in the absence of the negligence of the third party. \* \* \* The best evidence upon such an issue is the testimony of experience, because what has been is our best guide to what will be. *The challenged acts and omissions of the defendant had been in operation for many months.* If they had produced such a consequence as the fall and injury of the plaintiff in the past, that fact would have raised a strong presumption that this was their natural tendency. *If they had produced no such result, the counter presumption was not less strong.* It is for this reason that courts frequently speak of the fact that no such injuries as those upon which the actions



under their consideration are based have occurred before as persuasive evidence that the disasters could not have been foreseen or reasonably anticipated as the probable result of the acts upon which the suits are based.” (Italics ours). (pp. 115-118)

In 1 Cooley on Torts, (3rd Ed.) page 99, it is stated:

“Proximate and Remote Cause. It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is, that in law the immediate and not the remote cause of any event is regarded; and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. \* \* \* *If the wrong and the resulting damage are not known by common experience, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action.*” (Italics ours)

In *Davis v. Schroeder*, 291 Fed. (8th Cir.) 47, the railway company *negligently left* a crossing gate down and one Jones ran into it with his auto, whereby he lost control of his auto and bumped into another auto, injuring the plaintiff, who was riding therein. In reversing a judgment for the plaintiff, the court, after citing and quoting from a number of cases, said:

“From these citations the clear rule is apparent that an injury that could not have been reasonably anticipated by a person of ordinary prudence and intelligence as the *probable result of the act of negligence is not actionable*; nor is such injury actionable if it would not have resulted from the alleged negligence, but for the interposition of some new and independent cause that could not have been reasonably anticipated. \* \* \*

\* \* \* \* \*



“The question of concurrent negligence does not save the situation here for defendant in error. *Concurring negligence cannot evolve proximate out of remote cause.* Concluding, as we do, that the wrongful act of Jones in driving his car at a reckless rate of speed, in violation of the city ordinance, was the proximate cause of plaintiff’s injury, the holding necessarily follows that the court erred in refusing to sustain the motion to instruct a verdict for defendant.” (*Italics ours*) (pp. 50, 52).

See also :

*American Bridge Co. v. Seeds*, 144 Fed. 605 (8 Cir.).

The question of proximate cause being one of general law, the rule recognized by the United States Supreme Court and other Federal courts should control.

However, the rule in the Federal courts is in harmony with the rule generally adopted by the state courts. See the following cases :

*Staff v. Montana Petroleum Co.*, 88 Mont. 145, 291 Pac. 1042;

*Sawyer v. Southern California Gas Co.*, 274 Pac. (Cal.) 544;

*Johnson v. Mallory*, 243 N. W. (Neb.) 872;

*Paris & G. N. Ry. Co. v. Stafford*, 53 S. W. (2d) (Tex.) 1019.

See also :

*Stout v. Denver Park & Amusement Co.*, 287 Pac. (Colo.) 650;

*Illinois Central Ry. Co. v. Oswald*, 170 N. E. (Ill.) 247;

*Gaupin v. Murphy*, 145 Atl. (Penn.) 123;

*Johns-Mandille v. Pocker*, 26 Fed. (2d) 204;

*45 Corpus Juris*, p. 925, Section 488, and p. 935, Section 494.

In the opinion in the case of *Johnson v. Mallory*, above cited, the court said:

“Two acts of independent source are *not concurrent* in causing an injury, if one of them *merely furnishes a condition* by which such injury is made possible, and later such injury occurs through the efficient, self-acting, and independent operation of the other. In such case the latter and not the former is the proximate cause of such injury.” (Italics ours) (p. 875)

In the case of *Staff v. Montana Petroleum Co.*, above cited, the court, in holding that the prior negligence of the plaintiff in allowing gas to accumulate in the basement was not concurrent with the negligent act of lighting a match that caused an explosion, said:

“‘It is, however, wholly immaterial how the gas came into the cellar. It was entirely harmless there, except to persons inhaling it. If not interfered with, it had no tendency whatever to produce the accident complained of. It was a very explosive fluid, and the accident was caused by the explosion, and that was caused by the lighted match; and the only negligence, in any way connected with the accident, was in lighting the match in the cellar.’ (Lannen v. Albany Gaslight Co., 44 N. Y. 459).

“The rule is stated by the supreme court of Illinois in the following language: ‘If the negligence does nothing more than *furnish a condition* by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, *the two are not concurrent*, and the existence of the condition is not the proximate cause of the injury.’ ” (Italics ours) (p. 1046).

Also,

*Simons v. Jennings*, 46 Pac. (2d) 704 (Mont.) at p. 708 par. 9;

*Texas Gulf Sulphur Co. v. Portland Gas L. Co.*, 57 Fed. (2d) 801 (1st Cir.)—Certiorari denied in 287 U. S. 601.

If, as we contend, there is no actionable negligence, so far as the property of the plaintiff is concerned, then, of course, there is no question of proximate cause for consideration. Furthermore, unless the defendant was guilty of actionable negligence as to the property of the plaintiff, there can, of course, be no negligence *concurring* with the act of God in producing the damage. It was *not ordinary high water* which caused the damage, but it was the *increased* flow over and above the ordinary high waters which caused the damage. In other words, *except for the unprecedented flood*, the water *could not have reached the plaintiff's premises* as it never had before. Under these circumstances, it cannot be said that the *condition* produced by the defendant caused any part of the damage.

## V.

### DAMAGES NOT SEGREGATED.

Assuming, for the purpose of argument, that there was actionable negligence, plaintiff wholly failed to prove what damages, if any, he sustained over and above the damages that would have occurred had there been no railway embankment or bridge across Beaver Creek. This question is raised by paragraph seven of defendant's motion for a new trial (R. p. 800), Specification of Error No. 1, and by paragraph (f) of Division One of Petition for a New Trial (R. p. 827), and by Division Three of the Petition for a New Trial, quoting an instruction on this point as given by the Court (R. p. 835), Specification of Error No. 2.

The evidence shows that the high water in Beaver Creek in 1929 at Massey's place, about 2250 feet south of the creek bank just south of town, reached a depth in some places of 14.2 feet above the bottom of the creek or low water mark (R. pp. 274,



308, 559, 646 & 681), and that this high water extended for 600 feet west from Massey's, according to Lyman (R. p. 313), and from 800 to 900 feet according to Oien (R. p. 556).

A cross section, Defendant's Exhibit D-17, taken at Massey's place (R. pp. 552-553), shows the elevation of high and low water there.

Mr. Massey testified that from his place this volume of water 14 feet deep and from 600 to 900 feet wide, "moving quite fast, going faster than a man would ordinarily walk" (R. p. 143) went straight from his place toward the city water tower or perhaps half way between the city tower (shown on Relief Map) and the Mattie Miller house (R. p. 142). The Mattie Miller house is located just north of the intersection of Beaver Creek and Wibaux Street and on the east side of Wibaux Street (R. p. 97).

The fall in the creek from Massey's to the bend in the creek just south of town where it turns east near the water tower and flows towards the Mattie Miller house is 5.6 feet. The distance between these two points is 2,250 feet (R. p. 565).

The admitted elevation of low water in Beaver Creek at its intersection with Wibaux Street, is 2626.7 feet, and the elevation of the high water in 1929 at the Mattie Miller house, only a few feet from such point of intersection, was 2640.6 feet (R. p. 306), or a difference of 13.9 feet. So this great volume of water passing Massey's place, was still at about the same depth above low water when it reached the creek bank just south of town, and west of the Mattie Miller house. See testimony of Engineer Lillis, on this point (R. pp. 648 & 653).

The elevation of the north bank of the creek in this bend south of town at the intersection of E. Street is only 2633.9 feet, or only 7.2 feet above the low water mark of 2626.7 at that point (R. pp. 306 & 314).

These undisputed physical facts show that a volume of water about 14 feet deep came rushing down from Massey's place and passed over the creek bed, only 7.2 feet deep, at the point where the stream makes more than a right angle turn to the east.

Defendant contends that this water necessarily overflowed the creek bank and would have damaged plaintiff's property had there been no railway embankment or bridge farther north. On this point, Mr. Lyman, plaintiff's witness, testified:

"Q. If you had water to a depth of 14 feet rushing across that country and nothing but seven feet to stop it, you would expect some of that water to go into the town, wouldn't you?

A. I would expect some of it to go down the swale, yes" (R. p. 314).

Mr. Lillis, an hydraulic engineer and a witness for defendant, testified:

"Referring to the relief map and the testimony that has been submitted, particularly the testimony of Mr. Lyman; he testified that the water at the Massey place reached a depth of about 14 foot during the flood of 1929; that it just spilled over the bank at the sharp bend at the upper side of the Massey place. That water then according to Mr. Massey, he laid his pointer on the relief map, showed the direction of the flow, the direction almost directly north toward the town. At the next large bend in the creek Mr. Lyman testified, so did other witnesses,—and I measured it myself—that the bank was about 7 foot high. That 14-foot depth of water coming down the valley in the direction of that bend, 7 foot of it would be stopped by the bank. Of course, it would splash up at that point the same as at Mr. Massey's. The upper 7 foot of it would go right on over the town. Of course, it would be obstructed as it entered the town, somewhat; as it got to the buildings, the obstruction would be greater. At first, the force—the greatest force—would have been where



the water hit the houses; they are the houses that were nearest, were moved from their foundation. When it got up into the town, it was just like another bank. That deflection would account for the Methodist parsonage floating off its foundation and floating to the east" (R. pp. 646-647).

As to whether the volume of water 14 feet deep at Masseys would spread out before reaching the bank near the Mattie Miller house and not flow through the town, Mr. Lillis testified:

"Now, the juror was asking about the depth of the water. The depth at the Mattie Miller house might have changed considerable due to the area of the cross section,—if conditions had been right, it might have been—but the testimony shows it didn't change materially; the testimony shows it was about 14 feet still. As to whether a flood of the proportions of the one that struck Wibaux on June 7, 1929, could be taken care of by any railroad bridge, so far as damage south of the town and so far as the railroad embankment is concerned, will say that all the analysis I can make from all the facts assembled, makes me say that the condition on that portion south of the town would have been practically the same if there had been *no railroad embankment there at all*" (R. p. 653). (Italics ours).

See also his testimony on Cross-Examination (R. p. 679), and on Re-direct Examination (R. p. 681).

That Mr. Lillis' opinion and testimony regarding the action of this water is correct, is shown by the testimony of 11 witnesses, then in Wibaux, the only one of whom is connected with the Railway Company being Mr. Kimball, its Road Master. They all saw the water overflowing this bank in waves and carrying away towards the north buildings, sheds, etc. (R. pp. 101, 445 to 447, 466 to 469, 512-514, 640, 724, 728, 738, 746 & 751).



In fact, every witness from Wibaux testified that the water was flowing *north* on Wibaux Street *at all times* during this flood except the witness White, a plaintiff in a similar action, and the editor of the newspaper (Defendant's Exhibit "C"), in which paper he referred to this great wall of water. White testified that it was customary for the water to first flow north to the railway embankment and then turn and flow south to the creek channel between the city water tank and the street east of it, and then again flow south through the town. We submit that the court will take judicial notice of the fact that water does not act in any such manner (R. pp. 105, 106 & 115).

Mr. White lived on the north side of the railway embankment, which would obstruct his view to the south. Furthermore he did not get up that morning until about 7 o'clock (R. p. 106), and as the waves of water came over the bank south of town before 7 o'clock (R. pp. 444, 472, 512, 639, 738, 746 & 750), White did not have an opportunity to observe the action of the water in 1929, testified to by these parties.

As to this absurd theory of Mr. White's, Engineer Lillis testified as follows:

"Q. You didn't get it from any witness that there was water flowing backwards?

A. If water came down that stream, it never turned around and went back up; that is against all laws of nature" (R. p. 659).

See also testimony of Engineer Blum on this point (R. pp. 693 & 696).

The undisputed physical facts and evidence referred to above show that plaintiff's store would have been flooded to a depth of at least four to five feet regardless of the embankment or bridge.

If a part of plaintiff's damage was due to the act of God, independent of any condition caused by the embankment and bridge, then the burden is on the plaintiff to show what portion of the damage was due solely to the embankment and bridge. If this is left to speculation or conjecture, as it was at this trial, the plaintiff cannot recover.

17 Corpus Juris, section 90, page 758, states the general rule as follows:

"Where there is evidence as to the damage from various causes, as to a portion of which defendant cannot be held responsible, and no evidence as to the portion of the damage resulting from the separate causes, the proof is too uncertain to permit the jury arbitrarily to apportion a part or all of the proved damages to the acts for which defendant is responsible."

In *Fort Worth, etc. Ry. Co. v. Speer*, 212 S. W. (Tex.) 762, plaintiff sued for damages from flood water alleged to be due to insufficient opening in railway bridge over stream. In reversing judgment for plaintiff, the court said:

"In the instant case it does not appear that the construction of the bridge as built was unlawful, or that at the time of the building there was any invasion of the rights of the plaintiff or any injury to his land. It was only upon the occasion of heavy rains and consequent increased flow of water down the stream that the impediment created such an obstruction as caused the water to overflow plaintiff's lands and injure them and the crops thereon. \* \* \* Where it is shown that land would have been flooded by natural causes, but the defendant's act has increased the loss, the measure of damages is the increase of loss. 3 Sedgwick on Damages (8th Ed.) paragraph 942, pp. 57, 58. \* \* \* Plaintiff testified that in his opinion the damage caused to the lands and the crops by overflow were more extensive subsequent to the con-

struction of the bridge than before, and that the overflow covered a larger area, but he failed to show to what extent the overflows were greater or the damage increased. It was incumbent upon him to do this in order to sustain a recovery. \* \* \* But he failed to show what the increase of loss was by reason of the construction and maintenance of the bridge, and how much of said loss would have been sustained in the absence of the bridge. As we have concluded that this case must be reversed for other errors hereinafter noted, we will content ourselves by stating that upon another trial the extent of the increased damage, if any, should be affirmatively shown" (pp. 764, 765).

In *Brown v. Chicago, Burlington & Quincy Ry.*, 195 Fed. 1007, the court, on this point, said:

"Summing up the principles applied in these decisions, it may be stated that in an action of this kind it is not sufficient to prove an obstruction of a stream, and that such obstruction contributes to causing an overflow and an injury; but the amount of overflow and damage which is caused by such obstruction must be traced. Ordinarily this requires that a comparison be made by evidence as to what overflow and injury would have existed in the course of nature under similar circumstances if there had been no obstruction, and only for the differences between the results is the one causing the obstruction liable.

"As there was no evidence from which the jury in these cases could have made this comparison, the verdicts were properly instructed for the defendant, and new trials are denied."

To the same effect as the above cases, see also the following:

*Western Union Tel. Co. v. Totten*, 141 Fed. 533;

*C. B. & Q. Ry. v. Gelvin*, 238 Fed. (8 Cir.) 14;

*Knowlton v. Chicago, etc. Ry. Co.*, 131 N. W. (Minn.) 858;

*Darnall v. Georgia, etc. Ry. Co.*, 68 S. E. (Ga.) 584;



*Texas, etc. Ry. v. Dunn*, 17 S. W. (Tex.) 822;  
*Miller-Link L. Co. v. Stephenson*, 265 S. W. (Tex.) 215;  
*Chicago, etc. Ry. Co. v. Martin*, 37 S. W. (2d) 207.

The rule announced in the above cases was recognized as correct by the Supreme Court of Montana in the *Heckaman case*, as the Court said:

“If, in a given case, it is conceded or shown that damage would have resulted regardless of the existence of an embankment, but additional damage was suffered by reason of the negligent maintenance of the embankment, the plaintiff must produce evidence as to the amount of damage for which the defendant is liable. (Fort Worth Ry. Co. v. Speer, above.)” (p. 266).

The court there refused to follow such rule on the ground that the case was not tried on that theory because the defendant had not interrogated witnesses for the plaintiff on that question and had relied solely upon the testimony of its expert that there would have been damage to Heckaman’s property had there been no embankment or bridge at all. This rule of law, which we believe the court should not have ignored on that theory, cannot be ignored on that ground in this case, as witnesses for both the plaintiff and defendant were examined thereon. (See plaintiff’s testimony, R. pp. 173 & 185-188; Lyman’s testimony, R. pp. 314 & 788; Lillis’ testimony, R. pp. 653, 679 & 681).

In the *Heckaman case*, the Supreme Court of Montana, at page 266, stated that defendant’s expert said there would have been a foot and one-half of water in the Heckaman store in 1929 if there had been no railway embankment (the Heckaman store is located just east of the Wagner store on the north side of First Avenue South). At the time this expert testified, he

relied on the 1929 high water elevation at Massey's place of 11 feet, as given by Lyman at the trial.

Later, these elevations were checked over by Oien and Lyman (R. pp. 304 & 305). It was then found that Lyman's elevation of high water at Massey's was 3 feet too low (R. pp. 671, 681 & 683). Defendant's expert did not have this correct elevation at Massey's at the time he testified (R. p. 682). If he had known the water was 14 feet high above low water at Massey's, instead of 11 feet, his figures on the depth of the water on Wibaux Street, regardless of the embankment, would have, of course, been greater than 11½ feet (R. p. 672).

As plaintiff's property would have been damaged regardless of the embankment and bridge, and as he failed to prove any damage in excess thereof, or furnish any reasonable basis for the jury to segregate such damages, defendant's motion for a directed verdict should have been granted. Also its petition for a new trial should have been granted on this ground, and also on the ground that the verdict is against the law as contained in the instruction of the Court on damages (R. pp. 813 & 835).

## VI.

PLAINTIFF'S CASE WAS BASED UPON OPINION OF WITNESS LYMAN. LYMAN'S TESTIMONY WAS IMPEACHED AND HE WAS SO COMPLETELY DISCREDITED THAT VERDICT CANNOT BE PERMITTED TO REST ON HIS TESTIMONY.

Plaintiff's case is based mostly on the evidence of Lyman as an expert. The alleged insufficiency of the bridge, narrowing of the channel, volume of water, etc. is based solely on his opinion evidence.

At this trial, and the one immediately preceding it in the state court, Lyman testified that he computed the flow of wa-

ter past Massey's place in 1929 at 15,813 cubic feet per second (R. p. 288), and the speed of the water at that point at three miles per hour (R. p. 312).

He also testified as an expert for plaintiff at other similar trials in the state court (R. p. 314).

On cross-examination at this trial, he admitted that at one of these earlier trials in January, 1934, he testified that the water at Massey's was traveling about five to six miles per hour, and at that velocity there would be about 33,000 cubic feet per second (R. p. 317). Also admitted that at the trial of the case of *Bailey v. Northern Pacific Railway Company*, in September, 1933, he testified that the water at Massey's was going about eight miles per hour (R. p. 318), and that he computed the flow at 30,000 cubic feet per second (R. pp. 789-790).

At the earlier trials, Lyman testified that the elevation of the high water in 1929 at Masseys was 11 feet above low water. It was upon that basis he and an expert for the defendant computed a flow of 30,000 cubic feet per second in 1929 (R. pp. 681, 683 & 790).

When Lyman and Oien, before this trial in the Federal Court, checked these elevations (R. p. 682), Lyman had to admit that the water was 14.2 feet above low water at Masseys in 1929 (R. pp. 304, 305, 307, 671, 681 & 683).

Lyman's opinion that the bridge was insufficient to handle the ordinary high water that could be expected was based largely on Myer's and Talbot's formulae (R. pp. 288, 319 & 320). Upon being required to read the authors qualifying comments on such formulae (R. pp. 320 & 321), it shows that they apply to "culverts" instead of "bridges," and were given under a chapter in the book headed "culverts and minor bridges". It also appears from these authors' comments that these formulae are not reliable as they depend so much on the judgment of the



engineer in choosing the proper co-efficient, and it also appeared that "bridges and trestles" are considered by the authors in an entirely different chapter (R. p. 321); that such formulae as Myer's and Talbot's are worthless in determining the proper size of a *bridge*, like that over Beaver Creek, and are only used in the construction of "small culverts". (See testimony of Bridge Engineer Clements, R. pp. 592, 593, 605 & 606, and especially p. 635 indicating that counsel for plaintiff, in showing witness a book, had endeavored to conceal certain language referring to these formulae).

Samuel Murray of Portland, Ore., a bridge engineer, testified regarding these formulae, as follows:

"I have an opinion as to such formulae being accurate to determine the open area necessary for a bridge such as the railroad bridge over Beaver Creek at Wibaux. Such formulae are entirely useless for an area of any great extent and, in fact, I have very little confidence in them for any use whatever. I ceased using them after I had been in practice for a very few years; they are totally, or approximately unreliable" (R. p. 699).

In *Peel v. Chicago, etc. Ry. Co., supra*, the court, at page 619, comments on the variance and uncertainty of such formulae, even for culverts, and said:

"Did these engineering formulae raise a conflict in the evidence upon which to justify a finding of negligence in providing inadequate culverts? We think not, in view of the history of this drainage area."

Engineer Baer planned the County Highway bridge across Beaver Creek, with an area of 920 square feet, which he considered ample and adequate to take care of Beaver Creek (R. p. 502).

Lyman, in an attempt to escape the force of the fact that as late as 1907 the County constructed a bridge with an area

270 square feet less than the railway bridge, which Lyman admits had an area of 1190 square feet (R. p. 337), contended that the low ground between the county bridge and the elevators to the east was intended as an "escapement" or spillway for high water, and that the area of a cross section from the level of the county bridge east was 2230 square feet, which should be included in figuring the area or capacity of the county bridge (R. pp. 280 & 281).

This bridge was built higher than the highway to the east thereof. The ground east of the bridge was not scooped out to make a spillway. A main highway, known as the "Red Trail" runs from the bridge east over this natural low land on a fill, and is a graveled road (R. pp. 550-551). A small culvert under the road was provided to handle water between the elevator and raised sidewalk (R. pp. 551 & 552).

According to Lyman's theory, whenever there was high water in excess of what the bridge proper would carry, it was intended by the parties constructing the bridge that the excess would rush over this highway. In other words, wash out the highway and shut off travel from using the highway and bridge. The absurdity of such theory is apparent.

Mr. Baer, the engineer who designed the county bridge testified the bridge was designed to carry all the water that could be anticipated. Mr. Baer testified positively that no spillway was intended either east or west of the county bridge (R. p. 502).

A few moments before Lyman had testified that the banks of the stream were 600 feet apart (R. p. 277). He was then seeking to show that this low land south of the railway bridge and east of the county bridge was the *creek channel*—not an "escapement" for high water in excess of the capacity of the 60 foot county bridge.



By reason of the conflicting, inaccurate, vacillating and absurd testimony of Lyman, as shown above, we submit that his evidence and opinion that the bridge was not adequate to handle the ordinary high water in Beaver Creek does not even raise a substantial conflict with the evidence of the defendant, including the history of the stream, that it was an adequate bridge.

In *Casey v. N. P. Ry. Co.*, 60 Mont. 56, 198 Pac. 141, the Court, in holding plaintiff's evidence was insufficient to create a substantial conflict with that of the evidence of the defendant, said:

"In his testimony given upon the trial of this case the plaintiff contradicted himself repeatedly; contradicted the allegations of his verified complaint; was contradicted by his previous statements, by the physical facts, by every one of defendant's witnesses, and by his own witness, Marchington. Some of his declarations are too transparent to be entitled to credence, are improbable upon any supposition short of actual mental imbecility" (p. 145).

See also:

*Grand Trunk W. R. Co. v. Holstein*, 67 Fed. (2d) (6th Cir.) 780.

*Penn. Railroad Co. v. Chamberlain*, 288 U. S. 333.

With Lyman so completely discredited and impeached, the situation is similar to that in the case of *Southern Pac. Ry. v. City of Los Angeles*, 26 Pac. (2d) (Cal.) 896, where the court said:

"\* \* \* we are nevertheless impressed with the fact that at least four engineers, called as experts on drainage and water control and all familiar with the aqueduct and physical features of the country in the neighborhood of the break, testified in effect that it was 'safe and prudent to



construct and maintain such aqueduct at the location described without providing overhead or underground drainage or other drainage for the territory to the west of the aqueduct other than the drainage afforded by the aqueduct.'

"No contrary expert opinion was offered, and the court, knowing from the hypothetical questions propounded to the engineers who did testify that they had in mind, at the time of answering, the rainfall records and climatic conditions of the area involved as well as the structure and condition of the cone and means provided for turning the water through waste gates, was justified in our opinion in finding that no negligence was attributable to respondents in the construction of the aqueduct" (p. 899).

## VII.

### VERDICT CONTRARY TO LAW AS GIVEN BY COURT.

Defendant's petition for a new trial (Specification of Error No. 2) was based in part on the allegation that:

"The verdict is contrary to the law as given to the jury and particularly in the following portions of the Court's instructions, to-wit:

" 'If you believe from the evidence that the Railway Company, in raising the embankment of its railroad grade and constructing its bridge across Beaver Creek in 1898, employed civil engineers of at least ordinary skill and ability, and that it constructed, and thereafter maintained, the embankment and openings in question in accordance with the usage of ordinarily prudent and careful engineers under like circumstances, and so as to reasonably handle and care for such ordinary recurring floods or rises in Beaver Creek as were then known and as could be reasonably anticipated by the exercise of ordinary foresight and prudence, and that said openings did handle, in a reasonable manner, all flood waters prior to June 7, 1929, and that the flood of June 7, 1929, was an unusual, excessive

and extraordinary flood, which could not have been reasonably anticipated, then the defendant was not guilty of negligence; but the damage to plaintiff was the result of such extraordinary flood or act of God and your verdict should be for the defendant.'

" 'A water course or stream is the channel cut by running water with well defined banks and bottom through which water flows for substantial periods of each year.

" 'In constructing a railway bridge, the law does not require that the full width of such channel be left open but only that the water course be restored to its original state of usefulness, as near as may be. The phrase 'as near as may be', as used in this law, does not mean 'as near as might be possible'. It contemplates some variation from the original condition of the stream and allows some discretion in the engineers of the railway company in constructing a bridge to make such reasonable changes in the flow of the water therein as they find necessary in constructing a safe and practical bridge over the stream.

" 'Even if you find from the evidence that the channel was somewhat narrowed by the bridge, as constructed in 1896 and raised in 1898, but also find that the channel was then, or thereafter, straightened and deepened, so that it still carried off all the water which could have been reasonably anticipated by the exercise of ordinary foresight and prudence, including the ordinary flood waters, without any more interference with the flow thereof, than was reasonably consistent with the right granted the railway company to construct a safe and practical bridge over such stream, then you are instructed that there was no unlawful interference with the water course or channel of the stream by the defendant, and that it cannot be held guilty of negligence in the construction and maintenance of such bridge over the stream as it existed prior to June 7th, 1929' " (R. pp. 846, 847).

We submit that under the instructions given by the court and quoted above, and the undisputed evidence in this case on



the points covered by such instructions, that the jury disregarded the law as given therein by the court, and that a new trial should be granted upon this ground.

In *United Press Ass'n v. National Newspapers Ass'n.*, 254 Fed. (8th Cir.) 284, the court said:

"It is our opinion that the trial judge, being an integral part of the court charged with the duty and responsibility of seeing that justice was administered between the parties, should have granted a new trial, and that his failure so to do was an abuse of his discretion. The jury not only disregarded the undisputed evidence in the case, *but also the charge of the court.*

"For the error in refusing to grant a new trial, the judgment below is reversed, and a new trial ordered." (*Italics ours*) (p. 286).

In *Stetson v. Stindt*, 279 Fed. (3rd Cir.) 209, the court said:

"The third is based on the broad propositions of law that a verdict *which is contrary to the law of the case or which is not sustained by evidence in the case* must be set aside. On this general law some courts have squarely met the question and have held that an instruction on the measure of damages is an instruction on the law, that a verdict by the jury in disregard of such instruction calls for a new trial, and that, under these circumstances, refusal by the trial court to grant a new trial constitutes reversible error. (*Citing cases*).

"We are persuaded by the ratio decidendi of the last line of authorities that a verdict like the one under consideration, which is perverse and directly *violative of the charge of the court* and is wholly without evidence to support it, cannot stand." (*Italics ours*) (p. 211).



## VIII.

## REJECTION OF EVIDENCE.

## GOVERNMENT REPORT.

Specification of error No. 3 relates to the ruling of the court in sustaining plaintiff's objections to defendant's Exhibit D-12, which is a copy of the report of the Army Engineers to the Department of War regarding physical conditions and flood control at Wibaux, made after the flood of 1929 (R. pp. 322-324, 333 & 686). This exhibit has been certified to this court by the trial court. The report of the Army engineers has been submitted to Congress and was published as 73rd Congress, 1st Session—House Document No. 64. The report states:

“The maximum rate of run-off of record in the basin occurred on Beaver Creek at Wibaux, Mont., on June 7, 1929. It was estimated by the United States Geological Survey to be 33,000 second-feet for a drainage area of 311 square miles and was caused by intense rains over a small area, or what is locally termed as a ‘cloudburst’.”

This report shows the railway bridge over Beaver Creek was considerably enlarged after the 1929 flood. Notwithstanding the enlarged bridge, this report, among other recommendations, states:

“Practically the entire town is located within the alluvial flood plain of Beaver Creek, and in order to obtain complete protection from a flood similar to that of 1929, it would be necessary to construct levees on both sides of Beaver Creek south of the Northern Pacific Railroad tracks and on the west side north of the tracks. \* \* \* The left bank levee would encompass all the municipal area of importance. The right bank levee would be 0.76 miles in length and average 9 feet in height, while the left bank levee would be 0.93 miles in length and would average 9 feet in height.”

We submit that the jury should have had the benefit of the information contained in this report, which shows that regardless of the size of the bridge, damages would occur from floods like that in 1929 unless high dykes are constructed to protect the town.

Furthermore, Lyman testified that a bridge 116 feet long would have been sufficient for the 1929 flood, based on his computation of 16,000 cubic feet per second at Massey's place (R. pp. 301-302) as compared with his prior computation of 30,000 cubic feet per second at Massey's place (R. pp. 789-790). The admission of this report of the Army engineers would have been material evidence on behalf of the defendant, in view of such testimony of Lyman.

This document having been duly certified to by the proper official at Washington, D. C., was admissible without further proof. The exhibit in question was a report made by the United States Government in the course of an investigation conducted by it pursuant to the provisions of an act of Congress (see letter of transmittal of the Secretary of War to the Speaker of the House of Representatives, transmitting House Docket No. 6401). The exhibit in question is a part of the report. A Federal law makes the Secretary of War the custodian of the original of the exhibit.

"The Secretary of War shall have the custody and charge of all the books, records, papers, furniture, fixtures, and other property appertaining to the department." (Rev. Stat. § 217, 5 U. S. C. A. § 191).

A Federal statute provides that the exhibit *shall* be admitted in evidence.

"Copies of any books, records, papers, or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted

in evidence equally with the originals thereof." (Rev. Stat. § 822, 28 U. S. C. A. § 661).

While the statute provides that such exhibits shall be admitted, even though there had been no such statute as above quoted the exhibit should have been received.

Chief Justice Marshall, speaking for the Supreme Court of the United States, said:

"Whether these acts be or be not construed to authorize the admission of the copies offered in this cause, we think that, on general principles of law, a copy given by a public officer whose duty it is to keep the original, ought to be received in evidence." *United States v. Percheman*, 32 U. S. (7 Peters) 51, 85; 8 L. Ed. 604.

*Meehan v. Forsyth*, 65 U. S. 175 (6 C. C. A.)

"We understand the general rule to be that when a public officer is required, either by statute or by the nature of his duty, to keep records of transactions occurring in the course of his public service, the records thus made, either by the officer himself or under his supervision, are ordinarily admissible, although the entries have not been testified to by the person who actually made them, and although he has therefore not been offered for cross-examination. As such records are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath, they form a well-established exception to the rule excluding hearsay, and, while not conclusive, are prima facie evidence of relevant facts. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly." *Chesapeake & Delaware Canal Co. v. United States*, 240 F. 903, 907 (3 C. C. A.).



The above case was affirmed by the United States Supreme Court and is reported in Volume 250 U. S. at page 123.

*Cohn v. United States*, 258 Fed. 355 (2 C. C. A.).

*Long v. United States*, 59 Fed. (2d) 602, (4 C. C. A.).

*Breitmayer v. United States*, 249 Fed. 929, 932-933 (6 C. C. A.).

*Evanston v. Gunn*, 99 U. S. 660, 666; 25 L. Ed. 306.

As the record is lengthy we will refer to several matters regarding which we believe the evidence in the record should be pointed out and discussed under special headings:

## IX.

### MISCELLANEOUS MATTERS.

#### RECORD OF HIGH WATER IN 1900.

At the trial, counsel for plaintiff stressed the fact that a photostatic copy of record kept in St. Paul (Defendant's Exhibit D-24) indicated that the water was higher in 1900 than it was in 1921, and that the record was therefore notice to the defendant of the possibility of a flood such as occurred in 1929.

The evidence clearly shows that this record was erroneous for if it was correct, the 1900 high water came up to the bottom of the steel girder of the bridge, as it was raised in 1898 and existed in 1900, and would have reached an elevation of 2635.1 feet or 3.7 feet higher than the 1921 high water at the bridge, and flooded the town (R. p. 603).

No witness living at Wibaux or in the valley testified to high water in 1900. They all testified that in 1921 the water was the highest in Wibaux prior to 1929.

At the time of the trial of the *Heckaman case*, the witnesses for defendant had not checked matters to determine if this

record of 1900 high water (which no one recalled) was correct or not and could not check it during such trial at Baker. After that trial, it was checked up in St. Paul and no data or report found as a basis for the entry of such record (R. p. 624).

That this record is not correct is fully explained by Mr. Clements, Bridge Engineer for the defendant (R. pp. 603, 633 to 636).

Engineer Darling testified:

“The highest known water in Beaver Creek at Wibaux up to 1896 was the high water of 1893 with elevation of 2626.3 at the railway bridge. To my knowledge the 1893 high water was the highest water in Beaver Creek at Wibaux during my service with the N. P. Railway Company, 1879 to 1916” (R. p. 712).

Chief Engineer Blum testified:

“As I testified in the September and October trial, I had investigated that and am convinced that that record is stated erroneously” (R. p. 691).

The testimony of several witnesses living in Wibaux in 1900 shows there was no high water that year (R. pp. 637, 638 & 722).

#### OLD PHOTOGRAPHS.

Plaintiff introduced a photograph (Plaintiff's Exhibit 1), which shows high water in Beaver Creek at some time (R. pp. 49 & 61). This photograph shows a stone wall in the left center and about the middle of the picture, which wall is marked “X” with lead pencil (R. p. 62). This wall is also shown on defendant's relief map, immediately south of Orgain Avenue and west of Beaver Creek (R. p. 560). The wall is about 5 feet high and the picture shows that the water was only about half way up on the wall (R. p. 562). The elevation of the top of this stone wall is 2631.6 feet, or 3.8 feet below the level of

Wibaux Street (R. pp. 559 & 560). Therefore, this photograph shows that such high water at that time was about 6.3 feet below the level of the town and not such as to indicate danger. The picture also shows that the water was not being *impounded* but was *moving rapidly* towards the north and through the bridge.

Ella Graham, who lived in Wibaux from 1884 to 1906, and most of the time right on the west bank of the creek near this stone wall, testified:

“I don’t recall that water ever got high enough to overflow this stone wall that Pierre Wibaux put in there, and I don’t recall that I ever saw water high enough to be on Wibaux Street in front of my place” (R. p. 722).

A number of old pictures were introduced, showing water over the low ground south of the railway bridge, some showing blocks of ice in the water. These were probably taken while the concrete dam north of the bridge backed the water up over this low ground, as testified to by Mr. Kinney (R. p. 250), as the evidence is very indefinite as to just when they were taken. The adequacy of the bridge to carry ordinary high waters had nothing to do with the water impounded by this concrete dam, which was blown out long prior to 1929 (R. p. 250), or by ice lodging against it.

#### WATER UP TO THE STOCKYARDS.

At the trial, counsel for plaintiff contended that prior to 1929 high water had gotten up to the stockyards, basing such contention on Mr. Kinney’s testimony that he had seen water “from here at the bank *over to the stockyards*” (R. p. 242). Later, Mr. Kinney testified:

“I mean from the road here to the *rise at the stockyards*, probably more than a quarter of a mile wide. I mean



from the present county bridge *to the elevators there*, around the elevators. That ground is all *several feet lower than the level of Main Street here*" (R. p. 253).

The relief map drawn to a scale shows the *elevators* are much lower than the stockyards. If water from *Beaver Creek* had gotten up *to the* stockyards while Mr. Kinney had lived there, it would have been about 7 feet deep on Wibaux Street, as lowest point of stockyards is 22.1 feet above point "B" (R. p. 279) or 2642.1 feet as compared with 2635 feet on Wibaux Street.

#### INTERVIEW WITH RAPELJE.

In an attempt to show defendant knew its bridge was not sufficient, Dan Sutherland, a plaintiff in a similar case pending, testified to hearing a conversation which General Manager Rapelje, *now dead* (R. p. 541), had with Mayor Cullen at Wibaux in 1922 (R. pp. 157 & 158). At this trial, Sutherland was willing to go stronger than he did at the trial of the Heckaman case, as he now testified that Rapelje said they were going "to give us a new bridge over Beaver Creek—a *longer* bridge" (R. p. 158).

In his testimony at the trial of the Heckaman case, Sutherland said that Rapelje "didn't mention no length \* \* \* but we took it for granted he meant lengthwise" (R. p. 170). He also admitted that at this interview with Rapelje the only thing the Mayor wanted was an underpass through the embankment for school children and that some complaint was made about the center pier of the viaduct at Wibaux Street and of it being muddy under it (R. p. 168).

Testimony as to oral statements by persons, now dead, is subjected to the closest scrutiny and considered the weakest and least satisfactory of any evidence.

*Escallier v. Great Northern Railway*, 46 Mont. 238, 127 Pac. 458.

At the Heckaman trial, the defendant did not have Rapelje's written report to the President of the Company of this interview at Wibaux, made on April 9, 1922, *the day of the interview*, but the same was introduced in evidence at this trial (R. p. 541) as Defendant's Exhibit "J", and is set out at pages 543 to 545 of the Record. This report shows that the only things the committee wanted and the only matters discussed at that meeting were the viaduct or overhead bridge west of the depot and the underpass for school children west of that (R. p. 544).

Mayor Cullen's testimony as to what occurred at this meeting with Rapelje shows that the only things discussed were a concrete viaduct at Wibaux Street and an underpass for children (R. pp. 202 & 206). He testified that Rapelje said, "We expect to put that viaduct in but when we do so we intend to raise the track about four feet, but when we do that, you will see what will happen. We got to raise the track this way and that way",—that would be east and west along there, "or else it would make a 'bump'; you will have to grade way up there, and we will have to put in a new bridge or raise it." (R. p. 203.

Cullen also testified:

"Of course, if they raised the track easterly from the Wibaux Street viaduct or bridge as far as the stockyards, they would necessarily have to raise the bridge over Beaver creek, and that is what I understood Mr. Rapelje to mean." (R. p. 207).

Chief Engineer Blum and General Manager Sloan were also present at this interview and testified regarding the same (R. pp. 526-530 & 535). Their testimony corroborates Mayor Cul-

len and shows nothing was said about the bridge over Beaver Creek, except that raising the track four feet would also necessitate the expense of also raising the bridge to correspond.

ALLEGED LETTERS FROM TOWN COUNCIL OR CHAMBER  
OF COMMERCE.

Plaintiff alleged in his complaint (R. p. 5) and attempted to show that in 1921 and 1922, letters from the Town Council or Chamber of Commerce were sent to the Superintendent of the defendant, notifying him that the railway bridge over Beaver Creek was insufficient. The evidence does not sustain any such contention.

Mr. White, plaintiff in a similar case, testified that as a result of informal conversations at council meetings, and of the commercial club he wrote a letter to Superintendent Sloan at Glendive, regarding "securing some opening that would relieve us from apparent, at least,—flood conditions" (R. pp. 109-110). Just what the nature of this complaint, if made, was is not shown in his testimony. Even if a letter had been received from someone not an engineer and qualified to give an opinion on bridges, it would be immaterial unless it gave some definite facts in support thereof.

Mr. Sloan was Superintendent at Glendive from November, 1920, to the spring of 1924 (R. p. 535). He testified:

"Q. Now, Mr. Sloan, you may tell the court and jury whether any time during the four years of your superintendency of the Yellowstone Division, you were asked either by letter, verbally, or in any manner,—whether you received any request from Wibaux or the people of Wibaux, the Mayor or the Council, or anybody connected with it, the Commercial Club, or anyone else, to lengthen, widen, alter, or in any manner change the bridge over Beaver Creek?

A. I did not receive any such request." (R. p. 536).



Plaintiff also attempted to show by Mr. Orgain that, pursuant to a minute entry of the Town Council on April 3, 1923, he wrote a letter to the Superintendent regarding a larger bridge over Beaver Creek (R. pp. 213-221). This minute entry was not admitted (R. p. 221).

Mr. Orgain admitted that he had no recollection of writing any such letter (R. p. 217).

Counsel for plaintiff announced that Mr. Orgain had repeatedly stated that he had no independent recollection of writing any such letter (R. p. 219).

Mr. Sloan denied ever receiving any such letter (R. p. 536).

Even if evidence that members of the chamber of commerce or town council thought the bridge was insufficient, and this showed negligence of the defendant, if brought to its attention and no action taken thereon (and we contend that if true it would not prove negligence), the plaintiff failed to prove that the town council or chamber of commerce had ever notified the defendant that its bridge over Beaver Creek was insufficient to handle the ordinary high waters in said stream.

As already shown under the heading "Interview with Rapelje", the interview between Mayor Cullen of Wibaux and the Secretary of the Commercial Club, and other citizens of the town of Wibaux and Mr. Rapelje, General Manager of the Railway Company, at Wibaux on April 9, 1922, the only matters referred to by the Mayor and others that they wanted changed or improved were the viaduct or underpass at Wibaux Street, and the construction of an underpass west thereof, for the safety of school children.

Mr. Cullen, a former mayor of Wibaux, called as a witness by the plaintiff, testified he made no complaint about the bridge over Beaver Creek, and heard no complaint from others (R. p. 207).

The testimony of Chief Engineer Blum (R. pp. 526-530), and General Manager Sloan (R. p. 535), who were present at this interview, and the report of Vice President Rapelje made to the President of the defendant railroad, which report was made the same day that the meeting at Wibaux took place, make it clear no complaint of any kind was made regarding the bridge over Beaver Creek. (Defendant's Exhibit "J", R. pp. 543-545).

It thus appears from the testimony regarding this interview that as late as April 9, 1922, and after the 1921 high water, the officials and people of Wibaux had no complaint or criticism to make regarding the bridge over Beaver Creek.

As heretofore shown under the headings "No evidence of Actionable Negligence" and "Proximate Cause and Concurring Negligence" the negligence, if any, of the defendant merely created a *condition* and was *not concurrent* with the act of God that caused the damage to plaintiff's property and we submit that the defense of an unprecedented flood was conclusively established and precludes a recovery in this action.

### CONCLUSION.

For the reasons stated it is therefore most respectfully submitted that the judgment should be reversed.

FREDERIC D. McCARTHY,  
of St. Paul, Minnesota,

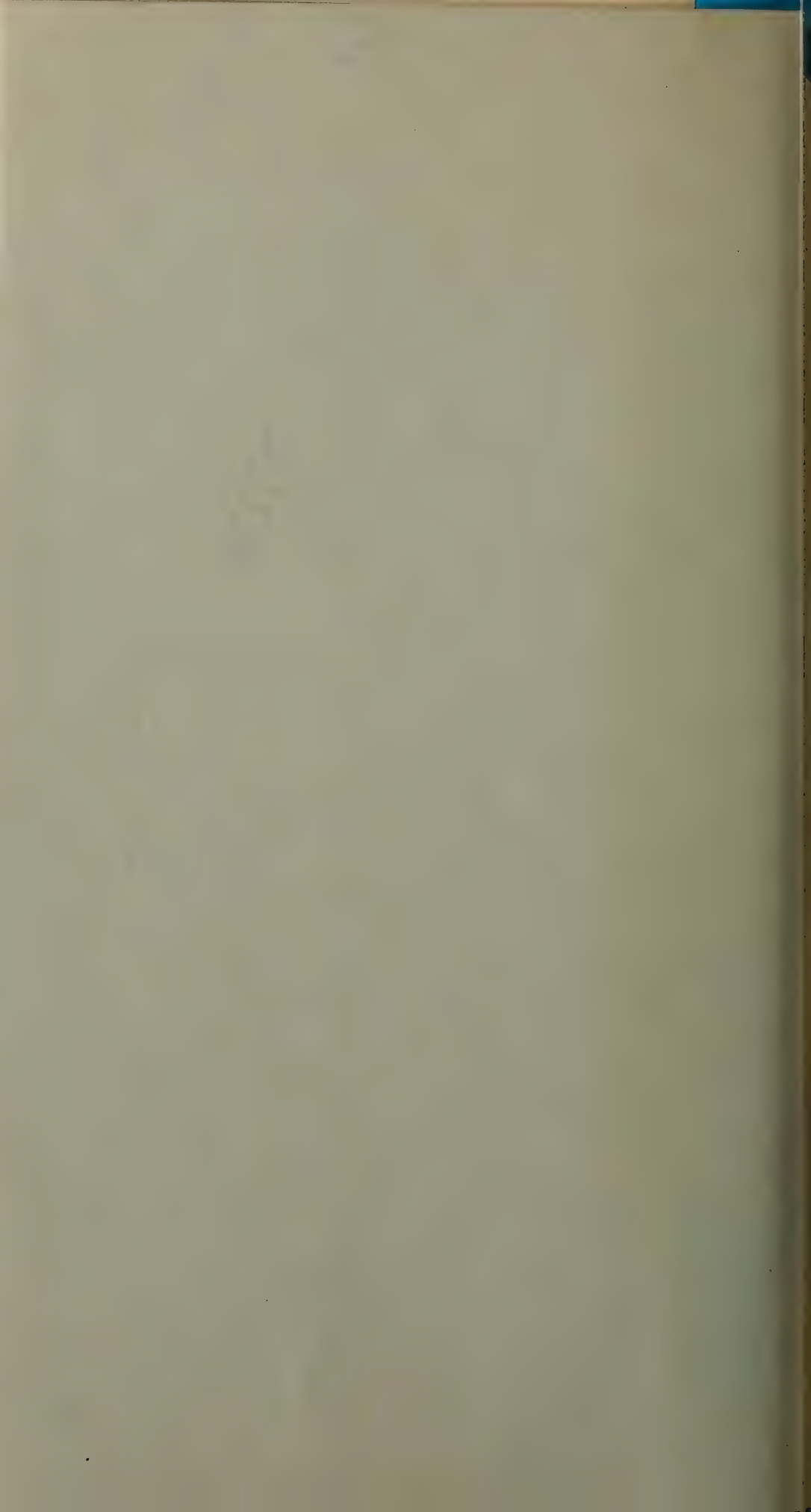
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Attorneys for Appellant.



Scale: 1" = 400'





No. 7876

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United States  
Circuit Court of Appeals  
For the Ninth Circuit 4

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NORTHERN PACIFIC RAILWAY COM-  
PANY, a corporation,

Appellant,

vs.

OLIVIA WAGNER, as Administratrix with  
the Will Annexed of the Estate of Nick Wag-  
ner, Deceased,

Appellee.

---

**BRIEF OF APPELLEE**

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THOMAS C. COLTON  
of Wibaux, Mont.

H. LOWNDES MAURY  
of Butte, Mont.

Attorneys for Appellee.

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Upon Appeal from the District Court of the  
United States for the District of Montana.

FILED

NOV 14 1935





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**BRIEF OF APPELLEE**

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ARGUMENT AND AUTHORITIES

I.

Preface.

Every effort has been made in Appellant's brief to confuse the court as to the state of the evidence. Effort will be made chiefly to clarify the case of these exaggerations and partial, even untrue, statements in

the Appellant's brief. Part of this confusion arises, perhaps, not from an intent on the part of the writer of the Railway's brief to deceive. He often boasts in oral argument that he has no knowledge of even the simplest laws of hydraulics, mechanics, or erosion. This leads him to place a line of maximum flow in a plat, annexed to his brief, straight over a hill instead of around the channel of the creek. He would have the Court believe that with a channel straight away to the west *offering the least resistance*, the water, *sua sponte*, forsook this channel, rose bodily, advanced north over the right bank in a depth of  $14\frac{1}{2}$  feet, and assaulted the town wherein plaintiff's property was situated several feet above ground level in clothing shelves in his store. This leads counsel to draw a little tributary stream north of the railroad bridge as if entering the main stream at a right angle in sandy soil. Of course, there can be no such phenomenon unless controlled by man either by wall on the ground or plat in a court house. This leads him to evoke evidence of witnesses that a wall of water was seen going into the town where the high water marks found afterwards by engineers were all in plane, a table, a level surface. None was ever found an inch out of plane *upstream* of the embankment. In the embankment before it broke down there were two high levels *downstream* because there was a second opening, the viaduct 11 feet higher than the bridge opening bottom level. Thus is he led into the absurdity of actually thinking that when a stream is high the water *flows faster* across country than



in the depth of a channel where the least resistance is offered. Perhaps he actually believes that a stream 11.3 feet high, 600 feet wide, without addition of rain or tributaries may in a 2250 foot run, on similar grade, spread to a width of 2650 feet, rise to a depth of 23 feet from the bottom of the creek or 20 feet above low water, *without obstruction*.

To the untrained mind, the fact that a sucking colt stood through the flood on about the line of appellant's asserted maximum flow on the brief plat, would show that the flood did not run up over the right bank 14 feet deep. But to a mind giving only slight heed to natural phenomena such fact adds nothing to conviction. Without it, a rational mind knows that it did not happen. Of course, the studious mind *knows* that the carrying power of water, i. e., force of running water, varies with the 6th power of the velocity: i. e., a stream going 10 miles an hour has a million times the force of one going one mile an hour. R. P. 327. That if 1/100 part of the testimony of the railway's wall of water witnesses had been the fact, timbers would have been splintered, pipes contorted, brick buildings demolished, railroad embankment eliminated, all in one rush of water. There is testimony in this record of one Lillis, an engineer for the railroad, that though south of the embankment the water stood 10 feet higher than it did immediately north, the embankment was not obstructive, that "the houses in the town dammed up the water."

The ordinary mind has such trust in the adjustments of nature as to believe that, excluding tributaries and

rainfall and sudden meltings, if houses on a bench upstream are not affected by a particular flood, houses below on a similar or higher bench will not be affected unless there be artificial obstruction. In fact, the further down the stream the less likelihood of damage to property on the same bench.

To the proof that the railroad embankment was *the proximate cause* of the rise of the water over Wagner's property, the mere fact that Massey's house, first upstream on the same bench escaped, though the channel was much narrower, Burke's house, second upstream similarly escaped, Parker's house, third upstream similarly escaped, makes more than a *prima facie* case, makes more than a preponderance, makes more than a moral certainty, makes such a sense of conviction, that in a civil case a rational judge would not permit a jury to find the contrary. The average of human intelligence has risen above belief in magic. Barrels do not float upstream with walls of water coming down. Methodist parsonages, whatever the belief of the unfortunately drowned occupant of this one may have been in present day miracles, in mad rushes of water do not rise up gently and float east to the centre then down stream a bit then off westward and light away from the bridge on the embankment, unless the embankment is obstructing.

In the *Salton Sea Cases*, 172 Fed. p. 819, it is held:

"The fact that an extraordinary flood came down the river contributing to the disaster does not relieve the defendant from responsibility. Under the conditions prevailing in that locality and known to have existed for many years, it was the duty of the

defendant to have maintained proper control of the water at its headgates.”

“No one is responsible for that which is merely the Act of God or inevitable accident. But when human agency is combined with it, and neglect occurs in the employment of such agency, a liability for damages results from such neglect. Such is the rule laid down and applied in *Polack v. Pioche*, 35 Calif. 416, 95 Am. Dec. 115. The expression “Act of God” excludes the idea of human agency, and if it appears that a given loss has happened in any way through the intervention of man, it cannot be held to be the Act of God, but must be regarded as the act of man. The evidence shows conclusively that it was defendant’s method of constructing the intakes that resulted in turning the flood of the Colorado river into Salton Sink. The floods of this river in 1905 and 1906 were great but no greater than would have been anticipated by the prudent person in view of all the conditions and history of that river.”

Much of the argument of the Railway’s brief is answered by a glance at its exceptions to the charge (R. P. 820-821). The only complaint of the charge was of the use by the court of the word “culpable” before “negligent act.” In this connection, the use of this word was more favorable to defendant than to plaintiff. It was merely a pleonasm. This word in instruction in *Montana* originated in *Mulrone v. Marshall*, 35 Mont. 238, 88 Pac. 797. Interesting also as asserting liability when a contractor negligently left a drain bank worn down, an unprecedented rain storm flooded plaintiff’s cellar. It answers much argument about liability depending on whether the railway must have previously damaged Wagner’s property before it could be held liable for this



injury. Marshall's drain had never flooded Mulrone's cellar before the time recovered for.

Nothing in the exception criticises definitely any part of the charge except that the court adverts to the complaint stating culpable negligent acts of defendant. The exception is not comprehensive of any other point of law, such as segregation of damage, proximate cause, anticipation of injury to plaintiff, liability for concurrence of negligent act of defendant with Act of God. No complaint appears there of failure to charge that a defendant is not liable if good engineers are employed, etc.

We do not contend that the copy of the report of government engineers was not properly authenticated. The original document itself was not admissable. The copy was offered as a whole. If there were anything relevant in it, this was not separated for the court by defendant. If there was material matter in it such was not sifted out. As we remember the document, it had 50 or 60 pages of fine print and a contour map showing impossibilities in nature, i. e. contour lines of water levels *intersecting each other*. It had no more of competency about it, than a report to a Senate Committee, or a proclamation of the governor of Montana that the railway was liable here would have had. In order to enable this court to pass completely and readily on this assignment of error, the evidence rejected should be inserted in brief totidem verbis, or at least as much of it as is thought to be material by the party charging error. The rule in point is not obeyed in the Specifications of Error.

## Prior Floods.

The evidence conclusively shows that the bridge impeded the flow of the water that came down Beaver Creek in ordinary recurring high waters before 1929. The opening at the bridge, according to Appellant's bridge records, was completely filled with water in the 1900 flood (R. p. 603, 289); it was almost filled in the 1921 flood (R. p. 119); railroad track of Appellant was washed out then from about one mile east of Wibaux to Hodges (about 10 miles) (R. p. 47); Mrs. O'Keefe, as a child, couldn't get to school from the Davis Addition on account of high water in the spring of the year (R. p. 71); there was more water in the Davis Addition in 1921 than in 1929 (R. p. 73); Senator Kinney testified about water backing up in the Davis Addition (R. p. 252); people were rescued out of the high water in the Davis Addition during the 1921 flood (R. p. 75, 127); prior to 1929 merchants had flood windows in their basements to keep out the water, but Sherman testified that since 1929 the water has never gotten into his basement (R. p. 80); witnesses testified as to the condition at the bridge during the 1921 flood (R. p. 119, 128); during times of high water in Wibaux, the water was always higher on the south side of the embankment than on the north side (R. p. 120, 245); grain in the elevator was damaged by backed-up water (R. p. 50); the part of the town of Wibaux south of the embankment was covered with water with the exception of a block and a half on Main

Street in the 1921 flood (R. p. 118, 155); ice blocks floated in all directions during break-ups (R. p. 120, 49).

“At the height of flood waters, it was customary for the water to come in from the south and meet with the resistances at the railroad embankment and back up to the south of the town again and swinging around in a horseshoe fashion, coming in on the west and meeting the current coming from the railroad bridge on the east and damming itself up at the viaduct, which appeared to be too small for a spillway.” (R. p. 105-106) (See also R. p. 120).

During the 1921 flood track was washed out 3 or 4 places between Wibaux and Yates (R. p. 130); in the 1921 flood there was a washout right at the east end of the bridge (R. p. 129).

“The damage that flood did to the railroad embankment to the east of the bridge, there was a considerable washout on the east embankment close to the east pier, which was afterwards—they hauled rock and dirt and filled in, because it was washed out so much that the railroad was unsafe, I should judge. I never was there to measure that, but I know there was considerable new work put in there soon after the flood of 1921; they riprapped it quite a lot higher than it was before at that time.” (R. p. 85).

An engine was derailed east of the bridge in the 1921 flood (R. p. 130); tracks were washed clean out into the highway east of Wibaux in that flood (R. p. 130); in 1921 the water was up to Sutherland's knees in his barn opposite Woodman's Hall (R. p. 164-165); water in the south end of Wibaux County washed out bridges in 1925



(R. p. 348, 354, 754); in the 1921 flood water was in Drake's livery stable about  $2\frac{1}{2}$  feet deep (R. p. 95).

"The highest water mark that I was shown at Lentz's, 800 feet to the north of the fill, before the 1929 flood, was for the 1921 flood and it was 8.2 feet above the bottom of the channel under the bridge. The correspondence that I would draw as an engineer, between that water mark at Lentz's and water going over the elevator track or going around over Second Avenue and down stream, explaining,—will state that the water never having been over that stage at Lentz's and considerable testimony at different times showing it having been through the swale and over the elevator tracks would indicate that several times at least, there had been a back-up of water at the bridge.

Q. Would that indicate to you as an engineer, that whenever there had been a back-up around through the swale or over the elevator tracks, if that testimony was correct, that there was obliged to have been a back-up?

A. Absolutely." (R. p. 298).

Counsel for the appellant says that the 1921 flood fell on the east and west hills of Wibaux. Miss Jones testified that there was more water at her place,  $2\frac{1}{2}$  miles south of Wibaux, in 1921 than there was in 1929, that this water all flowed into Beaver Creek (R. p. 461). Brophy, a witness for Appellant, said that it rained 8 or 9 inches one afternoon at his place in 1921 (R. p. 395); Brophy lives six miles south of Wibaux. Mrs. Edighoffer testified that in 1921 the water was up on the floor of the building on First Avenue southwest of the county bridge; and that "When he raised the door up, the water come in and spread over" (R. p. 454). In order

for the water to get up that high, it had to be 15 feet above the bottom of the creek. Charles E. White said that in 1921 water came right across First Avenue South into his basement (R. p. 103). Webber saw a foot to 16 inches of water go down the swale in 1923 and 1924 (R. p. 232). The water was deeper in the Davis Addition right within the water-shed of Beaver Creek Valley within plain sight of Appellant's depot and line in 1921 than it was in 1929, and certainly was notice to Appellant of what it might expect.

Appellant charges itself with such notice of these floods in its answer:

"That ever since 1881, the defendant company and its predecessors in interest, have been familiar with the rainfall, drainage area, and the physical conditions of said Beaver Creek, and Beaver Creek valley south of said railroad track." (R. p. 32-33.)

Had the 1921 flood been removed a few miles further west, the disastrous consequences would have been as great as in 1929; had the 1907 flood that washed away fences, corrals, machinery and buildings (R. p. 754), and covered an area to Marmarth, North Dakota, a distance of 30 or 35 miles (R. p. 759), been removed 20 miles further north, the disastrous consequences would have been greater than those of 1929. The 1907 flood was greater than the 1929 flood in the south end of Wibaux County (R. p. 761, 753-754).

## Other Notice.

Rapelje, an officer of the Appellant, meeting a group of citizens in Wibaux in 1922, after the 1921 flood, promised a new bridge (R. p. 158, 169, 203). Charles E. White, as City Clerk and Clerk of the Commercial Club, wrote a letter to the superintendent of the railroad in connection with the inadequacy of the bridge (R. p. 109-110). White was not cross examined on this matter.

The case of *Everetts v. Northern Pac. Ry. Co.*, 50 N. D. 894, 198 N. W. 685, a case brought against this appellant for the drowning of section men of appellant about 20 miles east of Wibaux in the 1921 flood that washed out the spur tracks at Wibaux and derailed the engine at Wibaux (R. p. 130, 87); the case of *Soules v. Northern Pac. Ry. Co.*, 34 N. D. 7, 157 N. W. 823, L. R. A. 1917A, 501, a case in which suit was brought against the Northern Pacific Railway Company for damages by water to store goods in Dickinson, North Dakota, a distance of about 64 miles from Wibaux on the main line of the Northern Pac. Ry. Co. The defense in both of these cases was somewhat similar to the case at bar. Commenting on those cases, the Supreme Court in the Heckaman case, a case arising out of the same flood as this one, 93 Mont. 384, 20 Pac. (2d) 258 said:

“The law governing in such a case as this was brought home to the defendant in a case arising at Dickinson, North Dakota, in 1914. (*Soules v. Northern Pac. Ry. Co.*, 34 N. D. 7, 157 N. W. 823, L. R. A. 1917A 501.)



“This brings us down to the Wibaux flood of 1921, which was described as ‘a great flood’ and was said by the district judge to have, perhaps, been unprecedented up to that time; the waters thereof inundated the town with the exception of a block or a block and a half in the business section, yet it was but the ‘tail end’ of a series of torrential rains which, fortunately for the inhabitants of Wibaux, extended east and west along the line of defendant’s road, causing great damage at Yates, Beach, North Dakota, and other points east of Wibaux within an area greater than that of the north and south series of rains of June 7, 1929. The flood at Beach resulted in an action, and judgment, against this defendant, and it must be assumed that the officers of the defendant company were thoroughly familiar with the fact that the territory round about Wibaux was subject to those violent tempestuous storms or cloudbursts. (Everetts v. Northern Pac. Ry. Co., 50 N. D. 894, 198 N. W. 685.)”

Much is said in Appellant’s brief in connection with the testimony of Sutherland in regard to remarks by Rapelje. All of this evidence is substantially corroborated. Blum said, in connection with the expense mentioned by Rapelje, that the expense of raising the river bridge was a part of the expense of raising the track, and that the reason Rapelje and his associates came to Wibaux was because there was complaint made about water being under the viaduct (R. p. 203, 532-533). This must have been 11 feet deep at the bridge and then some to spread to the viaduct. Blum went up to the children’s viaduct (R. p. 530), and, of course, he wasn’t present during all of the conversation with Rapelje.

Blum's testimony as to the expense of raising the river bridge and the track corroborates Sutherland (R. p. 532). In fact, it appears that the railway company in 1922 had complete plans for a new viaduct, the raising of the track, and a new bridge (R. p. 203). Dan Sutherland testified:

“And after he looked the piling over,—anyway, it was taken up about us getting a new bridge over Beaver Creek, and he said that at that time there were plans in St. Paul, were to raise the railroad track—I don't remember, it was five or eight feet—and that they wouldn't do nothing with that until they raised it, and when they did, they would give us a new bridge over Beaver Creek—a longer bridge—and also a new viaduct under Main Street. Joe D. Cullen was there at that time and when that conversation took place. There was never any new viaduct made there according to Mr. Rapelje's promise, before the flood of June 7, 1929. There was never any longer bridge made there before the flood of June 7, 1929.” (R. p. 158.) (See also R. p. 203.)

In this connection, it will be noted that since the 1929 flood the plans have been executed, the track has been raised five feet and a new viaduct and a new bridge put in. The management self serving report of Rapelje (R. p. 543-545) certainly is incomplete; it doesn't mention raising the track, the expense, or anything of that sort, although all the testimony shows that those matters were discussed (R. p. 537). Mr. Bushell, a witness for Appellant, although present at the meeting with Rapelje (R. p. 205), was never interrogated in regard to that meeting.

## Narrowing of the Channel.

White testified that the "narrow get-away" mentioned in his article in the paper was the viaduct and the railroad bridge (R. p. 116). The evidence clearly shows that the creek was narrowed by the embankment over Beaver Creek. The old profile map clearly shows the bridge abutment inside of the east bank of the creek. The east wing of the dam north of the railroad bridge ran parallel with the original bank of the creek (R. p. 154), and the piers of the old bridge were 70 feet from the east wing of the dam. Lyman testified:

"I found the nubs of an old dam here on the ground. They correspond with the bridge, in feet, on the ground,—the east end of the dam is about 50 feet east of the east abutment of the bridge; that would be 70 feet from the east pier." (R. p. 278.)

Sutherland testified:

"I have lived in Wibaux about 33 years,—since 1901. I recall the old Northern Pacific bridge as it existed around 1900 or 1901 at Wibaux. I recall an old dam that was built about 40 feet north, or downstream from the bridge.

Q. Tell us what correspondence, if any there was, as you remember it, between the east wing of that dam and the natural bank of the stream that existed there? How did they correspond?—the east bank of the stream and the wing of a concrete dam that existed there?

A. The wing of the concrete dam ran parallel seemingly, with the original bank of the creek,—I should judge right against the bank. The width



of the river-banks at the bridge as they first appeared to me when I went to Wibaux, I should judge was about 180 feet.” (R. p. 154-155).

The evidence further shows that around the year 1900 people drove on the channel between the piers and the abutments, but later on those spaces—*20 feet on each side*—were filled in with rock (R. p. 48). Woodard, a witness for the Appellant, attempted to disprove the fact of driving between the piers and the abutments of the bridge around 1900 or 1901, but he didn't get to Wibaux until 1909 (R. p. 734, 741). The dam north of the bridge was built in 1903 (R. p. 589). Of course, nobody could drive through there after the dam was built (R. p. 744). In the beginning there was a clear space of 114 feet from top to bottom of the bridge; as the railroad embankment was raised from time to time in order to save the expense of putting in new piers and new abutments, Appellant simply filled in between the piers and abutments on both sides of the bridge, to give the bridge the necessary strength to carry the modern engines. The bridge was first designed to carry small engines, not considering the increased weight of engines designed later. The evidence shows that there was added cement put on top of the piers when the track was raised in 1903 (R. p. 584), and the bridge was reinforced in 1904 (R. p. 618).

Blum, chief engineer for the Appellant, testified:

“If the bridge is so narrow that it extends water to the east of the bridge, on the side of Beaver Creek, is that an adequate bridge?

A. Ordinarily speaking, it is not; but it might be in some cases." (R. p. 693).

"If that bridge did back up water 1200 feet six or eight times and made a horseshoe around the town and water ran down the swale, why that bridge was not adequate, was it?

A. Possibly not; probably not." (R. p. 694.)

Clements further testified that the east span of the new bridge was the main span of the old bridge (R. p. 609). Clements, testifying on direct examination from Defendant's exhibits D-24 and D-23 (R. p. 578), photostatic copies of the bridge records of defendant (R. p. 575), and translating from these records the various high water marks as set forth (R. p. 579-588) and placing yellow wands on the bridge models to represent these high water marks (R. p. 588), deliberately ignored the letters of Defendant's exhibit D-24 "H. W. 1900, 7.3," meaning "high water in 1900" (R. p. 603), and deliberately failed to place a yellow wand to represent the 1900 high water mark when the water just touched the girder of the bridge (R. p. 603, and was 15 feet above the bed of the stream (R. p. 289), and when cross examined on this matter said:

"I have not prepared any of these little yellow wands and tacks to show the water-mark of 1900 on that bridge." (R. p. 613.)

At this trial there was a record of the 1921 flood, but at the Heckaman trial Clements did not have any record of the 1921 flood. He said that they did not keep any high water record *unless it was higher than*

*the previous flood*, so that the last high water-mark introduced in the Heckaman trial was the 1900 high-water mark, which goes to show that it was higher than the 1921 high-water mark.

Clements admitted that cloudbursts occurred in the territory about Wibaux (R. p. 613.)

Blum testified that a bridge 114 feet was sufficient (R. p. 626, 689). On pages 627-628 of the record, Clements evades all questions in regard to a 114-foot bridge.

Clements further advanced a theory, in order to contradict the plain physical conditions shown by the old profile map of Appellant (plaintiff's exhibit 26), (just as he, Clements, endeavored to contradict the plain record of the 1900 high water mark on defendant's exhibit D-24, R. p. 604), although he wasn't there and didn't go to work for the company until 1907 (R. p. 572), that at the time the railroad was built, there was a sort of swampy ground at the bridge and no defined banks (R. p. 600-601). Darling says:

“N. P. records further show the banks of the Beaver Creek to be no greater distance apart than 80 feet.” (R. p. 714.)

Darling did not produce these records although requested to do so (R. p. 713-714).

Clements further testified that the little stream coming down the north side (see sketch attached to Appellant's brief) originally cut across where the railroad embankment now is (R. p. 601). Beaver Creek runs from north to south. In order for the little stream



north of the embankment referred to by Clements, to cut across the embankment, it would have to enter the main stream against the flow of water, which phenomena is an impossibility, all tributaries enter the main stream with the flow of the stream (R. p. 302). The acute angle is always in nature in sandy soil upstream.

Mr. Murray, civil railroad engineer from Portland, Oregon, testified as follows:

“Q. And you were asked this question: ‘Mr. Murray, the best test, and perhaps the only good test on the sufficiency of a bridge over a particular stream is whether it carries the water that is seen to run in that stream year by year—isn’t that the best test?’ I asked you that question there, and you answered: ‘That is the best test under ordinary conditions, yes.’ You were asked this question: ‘In fact, when a bridge after being constructed is seen not to carry away floods that recur every two or three years, there is something wrong with the bridge, isn’t there?’ A. Yes. Q. And you answered: ‘If the bridge interferes seriously with the regular flow of the stream, I think the bridge is inadequate.’” (R. p. 700-701.)

Darling, the man who designed the bridge, never saw it since 1900 (R. p. 713), and although testifying from bridge records (R. p. 714) and requested to supply the original survey or a plat of the original survey of the Northern Pacific Railway Company or its predecessor, showing the elevation of its track as originally laid down from Medora to Glendive, *failed to attach them to the deposition* (R. p. 713).

## 5.

Stream Was Not Restored to Its Original State  
of Usefulness, As Near As May Be.

Subsec. 5, Section 6507, Revised Codes of Montana, 1921, provides:

“Every railroad corporation has power \* \* \* :  
5. To construct their road across, along or upon  
any stream of water, water course \* \* \* which  
the route of its road intersects, crosses, or runs  
along, in such manner as to afford security for life  
and property; but the corporation shall restore the  
stream or water course \* \* \* thus intersected to  
its former state of usefulness as near as may be,  
or so that the railroad shall not unnecessarily impair  
its usefulness or injure its franchise.”

The fact that Clements, bridge engineer for Appellant, as contended on page 39 of Appellant's brief, said:

“My opinion was, it would carry the water as well as it would, had there been no railroad there.”

or the fact that Lillis said the embankment did not have any effect whatever on the water south of the embankment, as contended on page 40 of Appellant's brief, or the fact that Darling, the engineer who originally constructed the bridge and never saw it or inspected it since 1900 (R. p. 713), said in his opinion the stream was restored to its original state of usefulness as near as may be, doesn't carry much weight. The physical conditions and all of the evidence in this case clearly show a violation of the statute.

The position of the nubs of the east wing of the dam right along side of the east bank of the creek, the nubs of the old bridge inside the banks of the creek, the narrowing of the original bridge from 114 feet to 65 feet, the width of the channel at the closest measurement Oien made for Appellant north of the bridge (700 feet) was approximately 170 feet (R. p. 295), the backing-up of water on the occasions of ordinarily recurring storms into the Davis Addition and around the town in a horseshoe fashion, together with all the other evidence, clearly show a violation of the foregoing statutes.

In the case of Heckaman v. Northern Pacific Ry. Co., 93 Mont. 363, 20 Pac. (2d) 258, a companion case, and arising out of the same flood as this case; the store buildings of both Wagner and Heckaman being the same distance from Appellant's embankment, both stores on the same street, First Avenue South (see sketch attached to Appellant's brief) and on the same elevation 2635 (R. p. 559), or 15 feet above the stream, with the exception that the floor of Wagner's building was at an elevation of 2635.9 (R. p. 560) or 15.9 feet above the stream, and with the further exception that the height of the lowest clothing from the floor in Wagner's store was a foot or a little more (R. p. 339, 173), leaving the Wagner clothing and goods close to 17 feet above the stream; it was held in the Heckaman case, above cited:

"Conceding that the storm of 1921 was 'unprecedented' and might not, under the authorities cited by counsel for defendant, be notice that a like or



greater storm might thereafter occur, the evidence epitomized above is sufficient to warrant the finding that the openings in the embankment were, to the knowledge of the defendant, insufficient to permit the waters of Beaver Creek 'in ordinary recurring high water' to flow down the natural channel of the creek, and, consequently, establishes the violation by the defendant of the mandate of section 6507, above, in that the defendant did not restore the stream to its original usefulness, as near as may be.

"This antecedent and concurrent negligence is shown, and, as above pointed out, the evidence clearly shows that the damage done the plaintiff was 'in whole or in part,' and perhaps wholly, due to this negligence. It follows that the fact that the flood of 1929 was unprecedented is no defense, and the verdict and judgment are warranted by the evidence."

## 6.

### 1929 Flood.

The proof absolutely and conclusively shows that the inadequacy of the openings in the embankment was the proximate cause of the injury. As stated in Appellant's brief, p. 11, the depth of the water at the south side of the bridge was 2640 or 20 feet deep, whereas the uncontradicted depth of the water at Lentz's place on the creek north of the bridge was  $8\frac{1}{2}$  feet according to measurements made by engineers (R. p. 282-283). Thus, the difference in depth of the water north and south of the embankment at the bridge in the 1929 flood was 11.5 feet. Presthus, the section foreman, was not far off when he testified that there was only

an inch of water in one of the rooms in the section house immediately north of the embankment, while across to the south side a distance of a couple hundred feet, there was about 10 feet of water (R. p. 259). Manning testified that the water was from 5 to 7 feet lower on the north side than it was on the south side (R. p. 210); Howard testified that the water on the south side was 7 or 8 feet higher than the water on the north side (R. p. 227); when the embankment broke the water went down fast (R. p. 227), whereas the high water at Massey's had fallen very little in the afternoon (R. p. 138), 4 or more hours after the water was out of Appellee's place of business on Main Street. Nelson, who lives 25 miles south of Wibaux (R. p. 760), testified that the water was highest at his place about 10 o'clock (R. p. 761). Combes, the aviator, testified:

"At 11:00 o'clock in the day the river 18 to 20 miles south looked equally as high as at 10:00, and that was June 7th, between the hours of 10:00 and 11:00." (R. p. 526.)

Shea testified that he lived about 15 miles south of Wibaux (R. p. 363); that he didn't see any wall of water on the morning of the flood (R. p. 367); and that it would take water 15 hours to get from his place to Wibaux (R. p. 368).

Water was backing into basements from the embankment before there was any water on Main street or in appellee's place of business (R. p. 67, 235); water was backing up from the embankment from 4 o'clock on, 3 hours or more before it reached Main Street (R. p.

52). It, therefore, is conclusively shown that the embankment with its insufficient openings was the proximate cause of the damage to plaintiff.

The proof shows that there was little rain at Wibaux, and all of the heavy rains during the 1929 flood were far south of Wibaux and on tributaries running into the Beaver. Brophy, who lives 6 miles south of Wibaux, testified that the water struck his place at 4 o'clock (R. p. 389). It must be noted that Brophy's place is very low. Brophy testified further that he had been bothered with water several times before 1929, and that he built a dike about 8 years ago to keep the water from running into his yard (R. p. 393-394); but that upon at least 2 occasions the water flowed into his yard and he had to move to higher ground (R. p. 394). Bryson, 38½ miles south of Wibaux (R. p. 347-348); Stark, 31 miles south of Wibaux (R. p. 347); Moline, 30 miles south of Wibaux (R. p. 353), testified for Appellant (R. p. 341-355); a dam that was supposed to have been washed out by the 1929 flood, was actually washed out by prior floods (R. p. 343); all of the water that fell in that vicinity, proceeding north went through a bridge on Beaver Creek without washing the bridge out (R. p. 354-355). Holstein, a witness for the Appellant living about 12 miles southeast of Wibaux (R. p. 378), testified that his house was about 7 feet above the bottom of the creek, and that no water got into his house (R. p. 381); that he lost 240 sheep (R. p. 380) because his men didn't take them the evening before the flood at Wibaux to higher ground, they were on lower ground than the floor of his house which was less than



7 feet above the bottom of the creek (R. p. 381). Efta testified for Appellant that he was marooned at Wicka's, 11 miles south of Wibaux (R. p. 372), that Wicka's house was about 7 feet above the bottom of the creek (R. p. 369), and that the barn was 4 feet higher than the elevation of the ground at the house (R. p. 371). That would make the barn 11 feet above the bottom of the creek. He further testified that a wall of water  $\frac{1}{2}$  to  $\frac{3}{4}$  of a mile wide (R. p. 373) and 6 feet high was coming up the valley (R. p. 371); that it didn't move a barn which was made of drop-siding 6-inch boards (R. p. 412); that the first raise of water was about 17 feet, and that this went down 4 or 5 feet, and then it raised again and stood at 15 feet at 2 o'clock in the afternoon (R. p. 374-376). All this water went through Wibaux after defendant's embankment broke without doing any damage to anybody, because nature had forced sufficient openings in the embankment to carry it by the natural channel.

Of course, as this water came down Beaver Creek Valley on the morning of the flood, it became less in volume as it proceeded. The actions of this flood at Burke's according to Burke's testimony, seemed to be confined within the banks of the creek and a swale between the barn and the house (R. p. 428); and this water apparently reached his place around 4:30 in the morning (R. p. 425). After Burke had his calves out of the barn, which was built inside the creek bank (R. p. 419), and the water was passing, the Parker boy drove into Burke's yard with a Ford car (R. p. 772). The Parker boy further testified that he left

the Ford car in Burke's yard and it wasn't damaged (R. p. 773).

A page and a half, 13 and 14, of Appellant's brief is devoted to a summary of Miss Jones' testimony who was 17 years old at the time of the flood. Let us analyze Miss Jones' testimony: she lived  $2\frac{1}{2}$  miles south of Wibaux (R. p. 460), about 1 mile north of Clem Parker's (R. p. 473),  $\frac{1}{2}$  mile south of Joe Burke's, Burke lives 2 miles south of Wibaux (R. p. 418). Massey lives north of Burke's, in town, as appears on relief map. Plaintiff's exhibit P-7 prepared by Oien, is a cross-section taken at Joe Burke's, 2 miles south of town, showing the distance between high water marks 420 feet, and the raise of water at Burke's 16.4 feet from low water (R. p. 335). How could all the walls of water about which Miss Jones testified, coming up the valley one after the other, get through an opening at Burke's of 420 feet wide without going clear over Burke's house? How could all these walls of water get through a 600 foot opening at Massey's without sweeping away Massey's house and the chickens which weren't molested in his yard, at an elevation of 14 feet above the creek (R. p. 274)? How could Massey's horses and sucking colt have stood on an elevation of 12 feet above the creek bottom, against the water, and not have been washed away? How could all the little wooden houses near the water tower have stood up against all these walls of water? Miss Jones' testimony will not stand up under analysis. We have used more space on her evidence than it deserves, but we believe this analysis is sufficient to answer all the witnesses of Appellant who testified about walls of water.

While we are on Miss Jones' testimony, she testified:

"As to whether I beat that wall of water down or whether it beat me in the race,—it was coming; when I got there, it had already come to Wibaux; I believe I would say it beat me there; it beat me very little." (R. p. 472.)

Then she testified that she rode her horse half way down Beaver Street, half the length of the board walk, and that then this wall of water cut across the country through the town (R. p. 466). She further testified that from where she was (down near the county bridge) she couldn't be accurate as to how far this wall of water extended to the west of Kinney's house (R. p. 467). She further testified:

"Q. Would you say that when that wave or wall of water reached the top of the swale as we call it, that it came towards the east or went down the swale, which?

A. Well, it seemed to divide more or less, it bumped into the buildings, the majority of it I believe, went to the east,—the greatest speed,—towards the county highway bridge; not directly east, but it came in a general easterly direction." (R. p. 490).

The fact of the matter is, Miss Jones never reached town until about 8:30 and never rode her horse down toward the county bridge as Wesley White borrowed her horse (R. p. 769). Further, it was impossible to get near the street where the board walk runs from 4 o'clock on during the morning of the flood (R. p. 234). In fact, Mrs. Edighoffer, another wall of water witness for Appellant, said that the wall of water went over the



top of the foot bridge, over the top of everything, and over the top of the cinder walk (R. p. 446). The cinder walk is a continuation of the board walk south to Ostby's.

Miss Jones, therefore, testified:

(1) That the walls of water beat her to town.

(2) That when she reached town down near the county bridge, she saw this wall of water come across the country through the town.

(3) That from where she was she couldn't see west of Kinney's house.

(4) That she saw the wall of water divide at the swale west of Kinney's house.

Her evidence is all self-contradictory, proceeding from youthful imagination.

Defendant's exhibit D-11 shows the corrected figures as agreed to by Mr. Oien and Mr. Lyman.

"Elevation of nominal low water Beaver Creek at Massey's cow shed 2632.2 \* \* \* \* Elevation of high water June 7, 1929, about 200 feet west of Massey's house 2643.5." (R. p. 685.)

On P. 15 of its brief, Appellant says that defenant's exhibit D-17 introduced in evidence shows in color the low water mark and high water mark at Massey's, and the difference between the low water mark and the high water mark on this exhibit is 14.2, according to the figures on defendant's exhibit D-11, agreed to by Oien and Lyman (R. p. 335). Mr. Lyman testified:

"As to what the rise of water was at Massey's place on June 7, 1929, he has no cross-section from

that but his figures that we have checked on. I think those figures are a matter of evidence; they are on the list of elevations on which Mr. Oien and I agreed. That is here now—D-11; from that, I was able to determine the rise at Massey's as 11.3 feet on June 7, 1929. In consideration by anyone, of D-11 and the figures for elevations set in this column here, 2620 feet should be subtracted from each of these to determine how high the given point is above the point B under the Northern Pacific bridge—2620 should be subtracted, and that is the top figure in the column, so that the next point, 2635.4, is really 15.4 above the bottom of the river under the bridge." (R. p. 335).

The difference between those two elevations is 11.3 feet, which was the depth of water at Massey's during the 1929 flood (R. p. 268, 685).

It was agreed by all witnesses that the water didn't get on the street in front of Appellant's place of business until 7 o'clock or after on the morning of the flood. Burke's residence is about 2 miles south of Wibaux. What happened to all those walls of water that supposedly came past his place at 4:30? There wasn't any such thing as a wall of water (R. p. 139, 763, 771, 775). There was no water in Burke's house 2 miles south of Wibaux in the 1929 flood (R. p. 430). There was no water in Clem Parker's house 4 miles south of Wibaux in the 1929 flood (R. p. 672). There was no water in Massey's house three-fourths of a mile south of the railroad in the 1929 flood, and his chickens sitting on the ground around the house weren't molested by water (R. p. 138). The elevation of the ground above the creek right at Massey's house was 14 feet

(R. p. 274). Massey further testified that he had 10 head of work horses and 2 colts stationed northwest of his house, that is, between his house and the railroad embankment, and that the water was up  $1\frac{1}{2}$  feet on the horses' legs (R. p. 137). Those horses stood all through the flood on an elevation of 3 feet lower than the street at Wagner's without being harmed (R. p. 137). The ground where the horses stood was about 12 feet higher than the bottom of the creek at Massey's (R. p. 302), and the water raised on those horses  $1\frac{1}{2}$  feet (R. p. 137). This is absolute proof that there was no wall of water and stands uncontradicted.

Appellant on page 26 of its brief quotes from the testimony of Zinda. Zinda lived in a house on the bank of the creek close to the swale (R. p. 642); he left his car and walked a distance of 5 blocks to Pickering's Pool Hall (see relief map and sketch attached to Appellant's brief) after the wave of water killed his car; as he walked past Wagner's, 4 blocks from where he left the car near the mouth of the swale (R. p. 159-162), there was a shallow sheet of water there (R. p. 642). Of course, at this time the low lands all around the town were filled up with water and had been filled up for more than 3 hours before that time (R. p. 52). The water was going over the mouth of the swale by the water tower and west of Zinda's long before there was any water on Wibaux Street at Wagner's (R. p. 162.) The town was surrounded by water before there was any water on Main Street (R. p. 54).



The action of the water at Wibaux on the morning of June 7, 1929, is clearly set out by the employees of Appellant who came to Wibaux about 6:30 with a work train on the morning of the flood. Eiden, one of the employees of Appellant and a witness for Appellant, testified that the train reached Wibaux about 6:30 and remained there for about 2 hours (R. p. 782); that at the time they reached Wibaux the water was coming inside the viaduct and it raised steadily until they decided to go back to Beaver Hill (R. p. 783); and that it raised steadily as long as he was there, and that possibly down through the viaduct it was going faster than any place else (R. p. 783). (See also 160-161). People were walking around on Main Street rescuing others when the water was up to their knees (R. p. 82), and walking in water up to their waists (R. p. 163).

Another peculiar thing in connection with the trial of this case, is that John Presthus, section foreman at Wibaux for 23 years (R. p. 258-259), was never produced as a witness to tell about conditions at Wibaux during the flood, or conditions at Wibaux before the flood, although he was on hand at Wibaux during this trial (R. p. 777).

The witness Kimball, a roadmaster for Appellant, testified that when he first arrived at Wibaux there was possibly 2 or 3 feet of water going through the viaduct and the majority of that water was coming back by the lumberyard, back by the depot, and that some of the water was coming from the Catholic Church

(R. p. 729). Kimball further testified that at 9:00 or 9:30 he looked off and saw a wall of water coming at least 5 or 6 feet high (R. p. 728). Kimball also testified:

“It was coming down Wibaux Street and to the main channel and to the west and coming towards the railroad once probably. When I seen it first, it was back by the lumberyard or possibly back up by Orgain Street, they call it. As to where that wall of water went: it came down and went through the viaduct and bridge.” (R. p. 728-729).

He wouldn't say if this wall of water was going straight north up Wibaux Street (R. p. 732). The other train men saw no such phenomena (R. p. 777-784), and there were no other witnesses produced to tell of this phenomena. At this time the bridge was full, still the wall of water went through without taking out the bridge (R. p. 730), and without moving the Kinney house, the Zinda house, or all the other houses south of town.

Woodward, a witness for Appellant, testified that he was standing on the embankment during the morning on the west side of the viaduct; that he was looking toward the north and south sides of the line because he had interests both ways; that although he heard Kimball testify about the wall of water, he didn't see any wall of water (R. p. 743). Cullen, a witness for Appellant, didn't see any wall of water coming down Main Street in Wibaux on the morning of June 7, 1929 (R. p. 500).

Wesley White portrayed the action of the creek on the morning of the flood vividly. He testified:

“As I crossed this railroad bridge at that time, describing the condition of the waters to the south of the bridge, will say that the opening in the railroad bridge itself was full and then on either side of the east and west side of the opening, the water was very much higher there, probably 4 or 5 feet. The water couldn’t get through you know and it was backing up around—backing up to the east and backing to the west. As to the direction that the waters were taking that were backing to the east or going to the east, will say they were backing and coming around—just making a circle and coming past around the elevators into the Davis Addition.” (R. p. 767).

Oswald Jobe testified for Appellant that he was working in the Hazlewood garage; that he got up in the morning between 6:00 and 6:30; that as he proceeded to the garage there was water coming down on the other side of the highway (this is the old swale); as he walked back toward the pool hall (Pickering’s), he saw water running between the lumberyard and the depot; that there was no water at that time on Wibaux Street or Orgain Avenue (R. p. 723-724); that after going to the pool hall, returning to the Milton Hotel (going west from Wibaux Street and along Orgain Avenue), the water was up to his breast; and that the water was coming around the garage toward him (from the west toward the east) (R. p. 725-726). Jobe further testified that it was coming around west of the Hazlewood garage and down Orgain Avenue, and also coming into the garage from the Milton Hotel, from the south,



and then turning down towards the north (R. p. 726).

White testified:

“According to my observation, there was a continuous swirling in the town during the entire flood period. You could hardly tell whether water was coming from one direction or another. There was a continuous swirling and at the time of the going out of the Methodist parsonage, the water seemed to be boisterous and receding back from the railroad embankment to the south of the town.” (R. p. 107.)

Articles moved in all directions during the flood. Shingles floated from the lumberyard straight west (R. p. 63); an oil tank floated up to the Catholic Church (R. p. 164); Drake said he saw a lot of stuff floating throughout the flood, some of it came up to Wibaux Street and then went east, and some came out of the same warehouse and went west (R. p. 96); the Odd Fellows’ Hall moved the length of itself in a northwesterly direction and turned right around (R. p. 164). This proves that the water was swirling around. The county bridge drifted in a northwesterly direction (R. p. 62) and landed back of the depot. The Methodist parsonage floated straight east off its foundation into the main channel of the creek (R. p. 69). Mrs. O’Keefe saw a barrel floating from the *north* to the *south* in the Davis Addition (R. p. 72). All of the people in the Davis Addition were moving to the south (R. p. 75, 763). Manning testified:

“I owned a building, a theatre, on Orgain Avenue at that time. There was plenty of change in the furniture, you might say, that took place during

the flow; it was all moved around every direction. Another article there, after the flood that I didn't have before,—I accumulated a tree in the front end, or chopping block, or whatever you want to call it. It was 5 to 7 feet long and probably 18 inches through. As to how that got through into the building, from a hole that I found there, it apparently had broken through the two storm-sheds. This hole was on the north side." (R. p. 210.)

Cullen testified that the water came rushing past the door of the lumberyard from up Orgain Avenue coming west, but when he got into the middle of the street the current wasn't so strong (R. p. 498-499). Paulson arose at 6:15 (R. p. 512), and the water seemed to be flowing into the south door and out of the east door (R. p. 513-514). Paulson didn't hear any rumbling noise of water before he got up (R. p. 514).

In connection with Stark's testimony (R. p. 506), nobody denies that there was plenty of water going through at the bridge in the afternoon. There wasn't any water on Main Street or Appellee's property at 1 or 2 o'clock. Paulson got off the stove at 1:30 (R. p. 514). Plaintiff's exhibit P-2 (the screen) shows very vividly the rise of the water on the north side (R. p. 150-151). Mrs. Sutherland, whose home was on the north side, testified that the water started rising in her house about 10 o'clock in the morning (R. p. 232). This is about the time the embankment broke. When the embankment broke it made a great noise, as the breaking of the sidewalk and the cracking of the timber could be heard even above the noise of the water (R. p. 93).

All of the evidence shows that the water was about 5 or 6 feet deeper on the south side of the embankment than on the north side, with the exception of Appellant's witnesses Woodard and Engineer Lillis. Pickering testified that as the water went through the viaduct it looked like a waterfall (R. p. 57). Lentz testified that when the opening at the bridge filled up, the water was like water going over a fall (R. p. 149); that after the embankment broke the water started to rise on the north side (R. p. 149-150).

Woodard testified that there was a sign on the Orgain building across from the lumberyard and facing north, and that this sign had the word "Groceries" on it; that he gauged the height of the water on the south side of the embankment by this sign (R. p. 739). At this point, we might say that the high water mark that he saw on the word "Groceries" must have been back-water, as the wall is facing north with a block of buildings south of it to the Wagner building and a fall of 4 feet from there to the viaduct, and immediately north of the track in the section house, the water came up 1 inch on the kitchen floor, whereas, opposite the house across on the south side of the track between the depot and the Orgain building, the water was about 10 feet deep (R. p. 259). This proves conclusively that the water reaching "Groceries" was back-water. Woodard further testified that he gauged the height of the water on the north side by a tree at the junction of Noland and Wibaux Street (right opposite the viaduct), and that the water was 6 feet deep, touching the limbs (R. p. 740-741). Of course, there was bound to be



deep water right opposite the viaduct, especially so after the embankment broke. The impetus of the water of the impounded lake south of the embankment raised the water undoubtedly on the north side when the embankment broke.

Sherman testified that he observed a door of the Community Church north of the viaduct swinging in the wind before the embankment broke when the water was highest on the south side of the embankment; that after the viaduct washed out, the water raised so that it closed the door against the building (R. p. 83). Lyman testified:

“All that portion in town south of the railroad track was covered by a comparatively level lake of water \* \* \* \* The entire south portion of town,—the portion west of the creek and perhaps half of the Davis Addition had been covered with water at a certain depth, and that north of the railroad embankment, downstream, and east of the creek, the water was from 10 to 13 feet lower than it was on the south side and west of the creek, and north of the embankment there was a difference of between 6 and 7 between the south side and the north side of the embankment.” (R. p. 266).

In the face of all this testimony, Lillis, the hydraulic engineer for Appellant, said the embankment didn't have any effect whatever on the depth of the water on the south side of the embankment (R. p. 645-646, 653). Lillis further testified that in arriving at his computations, he did not take into consideration the testimony of Shenehon (R. p. 656); the testimony of John Presthus, the section foreman, that the water stood 10

feet higher on the south side than it did on the north side of the fill (R. p. 657); the testimony of Mr. Oien that there was a different high-water level of marks on the north side of the railroad from what he found on the south side, and particularly at the Sutherland oil station (R. p. 657); the testimony of William Lentz that there was a difference of 10 or more feet between the high water marks at his place and the high-water marks at the Sutherland oil station (R. p. 657); the testimony of Massey that the water remained at about the same stage at his house until 3 o'clock in the afternoon of June 7, or approximately the same stage (R. p. 677); the testimony of John Bailey that water was backing up behind the building and came in from the north to the south (R. p. 679); the testimony of Miss Webber, the telephone girl, who said the water stood behind the telephone office here coming up from the north to the south for half an hour before it got onto the street in front of the telephone building (R. p. 680). Lillis further testified:

“The water had gotten over that part of Wibaux before it ever got to the railroad track, and it would have done so whether there was any railroad track there or not. I didn't take into consideration testimony that the water was going through the viaduct 4 or 5, or even 3, feet deep, coming from the east, and some coming from the west, before it got opposite Wagner's property at all.” (R. p. 679).

Appellant on page 56 of its brief quotes from the testimony of Lillis stating that Lyman had testified that

water reached a depth of 14 feet at Massey's during the 1929 flood. As heretofore stated in this brief, both Lyman and Oien found the water to be 11.3 feet deep. If, as set forth in this excerpt from the testimony of Lillis, water merely splashed over the acute angle southeast of Massey's caused by digging coal (R. p. 439-440), why would 7 feet of water splash over by the water tower where the angle is not nearly so acute, and if this phenomena occurred what would have happened to all the wooden houses (R. p. 515) in that vicinity? The only house in that region that was washed off its foundation was the yellow house and it was in the mouth of the swale. The Methodist parsonage was a block north and a block east of the bend.

As hereinbefore set forth, the elevation of the intersection on First Avenue South and Wibaux Street, where the Wagner building is situated near, is 2635 or 15 feet above the bottom of the creek (R. p. 559), and if water seeks its level, how could 7 feet of water flow from an elevation of 7 feet above the creek up to an elevation of 15 feet above the creek? Further, the evidence shows that the elevation of E Street, in the path of the swale, is 2633 or 2 feet lower than the street at Wagner's place, and if we concede that  $1\frac{1}{2}$  feet of water had gone down the swale, as it did southeast of Massey's, it couldn't by any stretch of the imagination get up to Wagner's place of business. There never was an opening in the railroad embankment at the south end of the swale.

Lillis further testified that he computed the number of cubic feet per second that went through Wibaux



at the time of the flood; he computed it just below Massey's, by the "horse island" six or seven hundred feet north of Massey's; he figured the quantity of water flowing by there was about 36,000 cubic feet per second (R. p. 649); he said the cross-section was 1700 feet wide (R. p. 657); that he made those computations according to Kutter's formula (R. p. 657-658); by using the same formula at First Avenue South he found 46,000 cubic feet per second passed through there (R. p. 661); and at a cross-section at Burke's, 2 miles south of town, 19,800 cubic feet (R. p. 673). Lyman figured it at 16,000 cubic feet, round figures, at Massey's. We think that the testimony of Lillis is not worthy of any consideration. At a former state court trial, Shenehon testified that with no embankment there would have been about  $1\frac{1}{2}$  feet of water on Wibaux Street. At another trial at Baker, an engineer for appellant Pennington testified to about the same effect. In the face of all the other evidence in this case, the jury couldn't believe the testimony of Lillis.

Much is said in Appellant's brief about Lyman stating that 30,000 cubic feet of water went through at Massey's. This 30,000 cubic feet of water was injected into the Heckaman case by Shenehon. Lyman had then made no independent study of the matter; he simply took Shenehon's word for it; in his testimony at prior trials, he simply assumed that there was 30,000 cubic feet of water going through.

"Q. Mr. Lyman, attention was called to certain of your testimony, about you having said, or claimed that you said, that there was 30,000 cubic feet of water passing Massey's. Was that given in an-

swer to a hypothesis of counsel that was submitted to you?

MR. McCARTHY: I submit the record itself shows.

Q. Read the record given at the same time and at the same examination, and from page 405 (Transcript on Appeal, case of J. R. Bailey, et al., and other cases, vs. Northern Pacific Ry. Co.)

A. Do you want me to read it aloud?

Q. Yes. Read it aloud, and commence at line 5. Was that testimony given by you at the same time and same examination where they say that you said there was 30,000 cubic feet going—Read it.

A. 'Taking my figures and assuming they are correct, and assuming there were 10,000 cubic feet of water per second passing by Mr. Massey's place in 1921, and 30,000 cubic feet of water per second passing by Mr. Massey's in 1929.'" (R. p. 329-330).

Lyman further testified:

"Q. When you were speaking of any speed of water at Massey's of 8 miles per hour, did you have in mind what counsel asked you to assume—that there was 30,000 cubic feet per second?

A. I think that was the basis—that certainly was my impression—that it was referring to a proposed flow of 30,000 cubic feet per second. I never assumed that there was any such flow there; I never believed that there was." (R. p. 332-333).

Lyman testified that the fall of the valley south of Wibaux was about 12 feet per mile, which means about 6 feet per mile on meanders, which is approximately twice the value of 3 (R. p. 338). He, therefore, used a slope of 3.2 per mile, hence his computations of 15,813 going through at Massey's. This amount going through at

Massey's compared with the amount, according to Lillis, going through at Burke's, and seems to be as nearly correct as computations can be made in this sort of matter. We make this statement because the vertical cross-section area of water going past Burke's was 4427 square feet (R. p. 673); the vertical cross-section area of water going past Massey's about  $1\frac{1}{2}$  miles north of Burke's was 3,774 square feet; however, the vertical cross-section area of water going through 3,000 feet south of the embankment, or 650 feet north of Massey's, where the water was 1700 feet wide and  $13\frac{1}{2}$  feet deep, and where Lillis made his computations of 36,000 cubic feet per second, was 9,271. Under no stretch of the imagination could the area of the water at Massey's going through a cross-section 600 feet between high water marks, be increased  $2\frac{1}{2}$  times 650 feet further north excepting by back-water. Therefore, computations figured at this point are of no more importance than computations at First Avenue South, 600 feet south of the embankment, where Lillis found 46,000 cubic feet per second.

The only actual demonstrative speed of water proven by any witness at this trial was that of Burke who testified that it took him 15 minutes to take the calves out of the barn, and that before he started to move the calves he saw the roll of water 50 rods or some such matter away (R. p. 432). Certainly, this water was not traveling 3 miles per hour.

On page 65 of its brief, Appellant for some unknown reason, states that according to Lyman's theory, when water couldn't get through the county bridge it would



go over the highway east of the county bridge. Lyman simply gave the actual measurements and elevations of the low ground east of the county bridge. In other words, this proof by Lyman which hasn't been contradicted, and couldn't be contradicted, shows conclusively that there was no embankment at the county bridge to hold and dam up the water, and therefore exploded the Appellant's affirmative defense of an embankment at First Avenue South. The presiding judge, the Honorable Charles E. Pray, saw the force of this argument (R. p. 280-281).

Lyman again is criticised on page 65 of Appellant's brief, that with a 10 or 11 foot flow of water the banks of the creek at the bridge would show 600 feet wide. In this regard Lyman was testifying from plaintiff's exhibit 26, the old profile, and testified that the portrayal of this condition on exhibit 26 corresponded with the relief map. However, on page 34-35 of its brief, Appellant contends that a 10 or 11 foot flood would come up against the bank or bench land, or level on which the buildings of the town stood, and would lack 3 or 4 feet of reaching the level of the town. This we agree to; but how can Appellant consistently contend in other parts of its brief that 7 feet of water, or less, would flow from an elevation of 7 feet in the creek bank south of town and go to an elevation of 15 feet at the street at Wagner's place, placing 5 feet of water in his store at an elevation of 20 feet above the creek; where the water south at Massey's was 11.3 feet above low water and the water at a cross-section 3,000 feet south of the embankment where Lillis took his measurements was

only  $13\frac{1}{2}$  feet where the horses stood, and which was enhanced several feet by back-water? The contention collapses.

The fall of the creek from Massey's to Mattie Miller's is 2.6 feet, or  $3\frac{1}{2}$  feet to the mile; from Mattie Miller's, or the green house, to the county bridge, 4.2 feet, or 13 feet to the mile; from the county bridge to the railroad bridge, 4.2 feet, or 15 feet to the mile (R. p. 297). Hence, the terrific fall of the creek from Mattie Miller's to the railroad bridge, which before it was dammed by the railway, enabled the water to evacuate and flow more freely (R. p. 298). By nature the site of the town was safe. The elevation of the terrain for several hundred feet on either side of the creek from Mattie Miller's to the railroad bridge is several feet lower than the Appellee's place of business. Because of these facts, the flood of 1929 would have, as nature intended, followed the creek and this low land to the bridge and would never have reached the town had it not been for the embankment with insufficient openings therein. This is proven conclusively by conditions north of the bridge on the creek where the slope and physical conditions were about the same as that south of the embankment, with the exception that the valley was much *narrower* north of the embankment than south (R. p. 266-268); the flood north of the embankment at Lentz's, 800 feet north of the embankment, was  $8\frac{1}{2}$  feet deep (R. p. 282), which depth was enhanced by release of impounded water south of the embankment after the embankment broke.

The fact that water south of the embankment was a comparatively level lake (R. p. 266) is further conclusive

proof of the absurdity of Appellant's contention that the flood water went over the embankment south of the town instead of following the creek and low land. If this were true, without the aid of tributaries or rain, there would have necessarily been 2 or more levels of water south of the embankment.

An observation of the bend of the creek turning in a southerly direction south of town, tends to mislead, but as hereinbefore shown, the tremendous fall actually follows the bend.

Defendant's affirmative defense of a wall of water 6 or 7 feet high and 2200 feet wide passing through the town and against the highway embankment on First Avenue South and flooding the property of the plaintiff to a depth of 6 or 7 feet before it reached the embankment (R. p. 36) has not been proven. We have seen that the embankment at First Avenue South couldn't stop any water because of the lowness of the land east of the county bridge which is 9.7 feet lower than the floor of the county bridge (R. p. 338). Wagner's place of business was north and west of this so-called embankment, and therefore the embankment should have been a protection to him rather than a detriment.

The evidence further shows that 700 feet north of the embankment on Wibaux Street, north of the viaduct, the width from high water to high water mark was 1420 feet, and the depth from the bottom of the creek 15.5 feet (R. p. 294); whereas at Lentz's place 800 feet north of the railroad bridge, the depth of the water during the 1929 flood was  $8\frac{1}{2}$  feet (R. p. 282). Therefore, as distinguished from the south side of the em-



bankment, there were 2 levels of water on the north side of the embankment: one level of water proceeding from the bridge, and the other level of water proceeding from the viaduct which is 11 feet higher than the bridge (R. p. 281). To use a homely expression, the lake south of the embankment during the flood might be likened to a pail full of water with a hole near the bottom representing the railroad bridge, and a hole further up representing the viaduct. Hence, the difference in the elevation of the water north of the viaduct on Wibaux Street and north of the bridge at Lentz's place. The reason for those two levels is obvious: as the water accumulated and impounded south of the embankment, a vast amount was forced through the viaduct.

In regard to accuracy of results obtained by Kutter's formula as used by Mr. Lillis in computing the flow of water 3,000 feet south of the track, 650 feet north of Massey's, at 33,000 cubic feet, Mr. Lyman testified:

"Q. And have you always explained that the Kutter's formula had to be modified at Massey's in view of this back-water that existed there?

A. There would be no way of modifying Kutter's formula. Your results wouldn't be correct if there was an added height to the back-water there. As to whether that would lessen the amount of flow by the place, will state that if there was back-water, it would give you a larger answer to your problem than would be true if there was none there; and I tried always to explain that whenever it was asked me." (R. p. 791).

"In regard to the accuracy of results obtained by Kutter's formula in such a cross section as the cross section which has been called 'M' during the

testimony of Mr. Lillis, will state that in my opinion, the accuracy would be much greater in a section such as that at Massey's or at Burke's. Explaining why: Kutter's formula is a formula derived—to find the average velocity of the flow through a channel,—channel being more such where the banks are so that the water is in a compact body, more probably for such a channel as an irrigation canal, and the farther it gets away from such a compact, uniform channel, the less reliable and less accurate it becomes.” (R. p. 785.)

“I heard the question of one gentleman on the jury to one of the witnesses for the defendant. As to whether there is any reason why that stream, Beaver Creek, on June 7, 1929, from Massey's to First Avenue South, should have been deeper in the valley where the valley was wide, than where the valley was narrow, will state that that reason was the results of back-water from the railroad embankment.” (R. p. 786.)

The record shows that many of the witnesses were asked by counsel for Appellant if the water was moving north. This matter is also referred to in Appellant's brief. In this regard Mr. Lyman testified:

“If a lake is created by an obstruction, \* \* \* \* and if there is a hole in the obstruction, there is a general movement of all of the water down the lake.” (R. p. 303.)

Appellant contends on page 11 of its brief that the high-water mark in 1929 was 2.8 feet below the top of the ties, and the high-water mark in 1921 was 11 feet below the top of the ties, showing that the high-water mark in 1929 was 20.1 feet deep at the bridge and the high-water mark in 1921 was 11.8 feet deep at the

bridge. It will be noted that these depths of the water at the bridge were artificial depths caused by the water being dammed up at the embankment. Had the 1921 flood been of longer duration, there would have been the same depth of water at the bridge as in 1929. The depth of the water at Lentz's, 800 feet north of the bridge, in the 1929 flood was  $8\frac{1}{2}$  feet, or 3.3 feet less than the *1921 flood south of the bridge*.

On page 27 of Appellant's brief, under the heading that the railroad embankment was washed out so as to create additional water-ways, will say that the big flood down the valley testified to by Combs, the water maintaining itself at practically the same height at Massey's on the afternoon of the flood, the water 15 feet deep at 2 o'clock in the afternoon 11 miles south of Wibaux where Efta was marooned, the big flood at Nelson's 25 miles south of Wibaux which was at its height at 10 o'clock on the morning of the flood, all this water passed through Wibaux in the afternoon and evening of the 7th and the morning of the 8th of June, 1929, without ever reaching Wibaux Street, due to the sufficient openings in Appellant's embankment left there by nature making openings in the fill.

In connection with the inadequacy of the bridge which Appellant contends on page 40-41 of its brief is not proven, Mr. Lyman testified:

"Having heard all of the testimony as to the bridge at this trial, having examined the history of the bridge from 1896 to June 7, 1929, as shown in the exhibits of the railway company,—knowing the size and condition of the watershed, and my own



examination of water marks, as to what my opinion is as to the adequacy of the bridge to permit the free flow of such waters as would reasonably have been expected to come to the bridge, will state that in my opinion, the bridge was very inadequate from the day or the time that they filled between the abutments and the piers and, in my opinion, that condition was very evident after the 1921 flood, that those conditions should have been—were self-evident to anyone examining them.” (R. p. 786).

“From the testimony that I have heard at this trial about the bridge, its measurements as given by Mr. Clements, the records that have been introduced by the defendant, and my actual survey of the ground around the bridge, you asking as to what I have to say about whether the stream was restored to its original state of usefulness as near as may be, by the bridge that stood over Beaver Creek at Wibaux—the railroad bridge, from 1896 to 1929,—the original condition of usefulness could not have been restored because the great deal of evidence shows the fairly frequent backing up of water by the insufficient bridge opening. In my opinion, that channel undoubtedly, was narrowed by the bridge; I would say it was narrowed from about 170 feet to 65.” (R. p. 785-786).

Assuming, but not admitting, that the Appellant employed engineers of recognized ability to plan and construct the bridge, this is not sufficient to release the Appellant from liability. The fact that subsequent experience shows that the bridge did materially obstruct the flow, is evidence that the bridge was not properly constructed regardless of the principles upon which it was built. *Heckaman v. Northern Pacific Ry. Co.* above cited, 127 Ruling Case Law, 1106; *Riddle v. Chicago, M. & St. P. Ry. Co.*, 128 Pac. 197, a Kansas case.

On page 42-48 of its brief, Appellant contends that there is no evidence of actionable negligence, referring to Subsec. 5, Sec. 6507, Revised Codes of Montana, 1921, hereinbefore cited, and states that the Appellant was justified in violating this statute because it did not owe any legal duty to the Appellee, quoting from *Corpus Juris* and other cases. The case of *Savings Bank v. Ward*, 100 U. S. 195, quoted on page 43 of the brief, has no application here. The rule stated in that case, that there was no privity of *contract between* the attorney who examined the title and the bank, and therefore suit did not lie. We have mentioned this decision to show the inapplicability of it to the facts in this case. The other cases cited are of like inapplicability to the facts in this case.

The liability in this case does not depend on privity of contract between the parties to the action, but on the duty of every man to use his own property so as not to injure the person or property of another. The correct rule is stated thus in 22 Ruling Case Law 117. In passing upon the question of legal duty, the Supreme Court of Montana, in the case of *Mize v. Rocky Mountain Bell Tel. Co. et al.*, 38 Mont. 521, 100 Pac. 971, held:

“It is urged by counsel for appellants that they did not owe any legal duty to Mize. This contention is aptly answered in *City Electric St. Ry. Co. v. Conery*, 61 Ark. 381, 54 Am. St. Rep. 262, 33 S. W. 426, 31 L. R. A. 570, a case in many respects similar to the one before us. The street railway company maintained a power line through certain streets in Little Rock. White owned a private tele-

phone line running at right angles to one of the railway company's lines. The private telephone wire came in contact with the power line and received a supercharge of electricity. Conery came in contact with the private telephone wire and was injured. He recovered against the street railway company and White, the owner of the private telephone wire. On appeal by the street railway company the question now before us was raised. The court said: 'The next question is: Upon what duty of the appellant to the appellee can this action be based? The answer to it is: Upon the duty enjoined by the rule which requires everyone to so use his property as not to injure another. The applicability of this rule may be shown by many illustrations. One is where an owner of a vicious animal accustomed to do hurt, knowing his habits, negligently allows him to escape. He is responsible for the mischief the animal does, because it was the duty of the owner to keep him secure. \* \* \* This rule applies with equal force to electric companies. They are bound to use reasonable care in the construction and maintenance of their poles, cross-arms and wires and other apparatus, along streets and other highways. They are required to do so for the protection of persons and property.' (21 Am. & Eng. Ency. of Law, 2d ed., 476.)"

The Appellant further contends that it was not required to anticipate an Act of God, quoting 3 Montana cases on page 42 of its brief. This doesn't relieve the Appellant of liability. *Heckaman v. Northern Pacific Ry. Co.*, *supra*. In the case of *Peel et al v. Chicago, etc. R. R. Co.*, 94 Mont. 334, 22 Pac. (2d) 617, quoted in Appellant's brief, the court said:

"This case is decided by the application of the principles laid down in the *Heckaman Case*, *supra*.



In each instance due consideration is given to the history of the stream, of the area drained, and of the openings of the embankments. In the Heckaman Case the application of the rules led to an affirmance of the judgment; the application of the same rules in these cases leads to a reversal of the judgments."

Under the heading of proximate cause and concurring negligence set forth on page 48-54 of Appellant's brief quoting several cases, will state that none of those cases have any application to the facts in this case. The Appellant has urged under the heading of actionable negligence and proximate cause, and generally through its brief, that it owed no legal duty to Wagner and that its negligence was not the proximate cause of the injury. Our court has held that the violation of the statute is negligence per se. *Westlake v. Keating Gold Mining Co.*, 48 Mont. 120, 136 Pac. 38.

The evidence in this case clearly shows a causal connection between the negligence of the Appellant and the injuries complained of. The causal connection is shown here by a preponderance of the evidence, and therefore, liability has been established. In the Heckaman case, *supra*, it is held:

"The contention of counsel for defendant that, as the defendant is only required to guard against floods reasonably to be anticipated, no liability can result from injury suffered, by reason of an unprecedented storm, regardless of the defendant's negligence, is supported by the cited cases of *Kansas City, P. & G. Co. v. Williams*, 3 In. Ter. 352, 58 S. W. 570, and *Harris v. St. Louis-San Francisco Ry. Co.*, 224 Mo. App. 455, 27 S. W. (2d) 1072.

However, in each opinion the court pointed out that the damage on which the action was predicated would have been as great had the defendant railway company been guilty of no negligence, which finding would have been a complete defense under all of the authorities. The Williams Case was cited with approval in *Lyon v. Chicago etc. Ry. Co.*, above, but only on the proposition that, if the damage is wholly the result of an act of God, the question of negligence on the part of the defendant corporation becomes immaterial.

“The rule in this jurisdiction is that, where damages are claimed for injuries resulting from one of two causes, for one of which the defendant is responsible, the plaintiff must fail if his evidence does not show that the damage, in whole or in part, was produced by that cause; but where the one is the act of God and the other the culpable negligence of the defendant, the defendant is liable for such loss as was caused by his own act concurring with the act of God. (*Raish v. Orchard Canal Co.*, 67 Mont. 140, 218 Pac. 655). ‘If an act of God alone would not produce injury, but, assuming there was an act of God, a plaintiff’s loss is made possible by reason of a prior, coincident or subsequent negligent act of a defendant, the latter, is liable, because his act is *causa sine qua non*.’ (*Lyon v. Chicago etc. Ry. Co.*, above; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70; *A. M. Holter Hardware Co. v. Western Mortgage & Warranty Title Co.*, 51 Mont. 94, 149 Pac. 489, L. R. A. 1915F, 835; *Walsh v. East Butte Copper Min. Co.*, 66 Mont. 592, 214 Pac. 641; *Jacksonville v. Peninsular Land etc. Co.*, 27 Fla. 1, 157, 9 South, 661, 17 L. R. A. 33, 65, and notes; 16 Am. St. Rep. 250, note.)”

Appellant in its brief on page 10 under unprecedented flood, and page 30-31 under Act of God, has quoted

the case of *Chicago, R. I. & P. Ry. Co. v. Turner*, 284 Pac. (Okla.) 855. In this case it was held that the faulty construction and maintenance of the bridge had nothing to do with the damage. However, in the case of *Oklahoma Railway Co. v. Boyd*, 282 Pac. 587, a case arising out of the same flood as that of *Chicago, etc. Ry. Co. v. Turner*, *supra*, the court adhered to the rule stated in the *Heckaman* case and the *Salton Sea* cases. Judge Diffendaffer wrote the opinion in both of those cases.

The case of *Central Trust Co. v. Wabash, etc. Ry. Co.*, 57 Fed. 441, is quoted on page 30, 31 & 32 of Appellant's brief under the headings *unprecedented flood*, *Act of God*, and *no evidence of negligence*; Appellant stating that this is a well considered case. In this case the facts were referred to a master who reported to the court recommending that the claims be disallowed. The court held that the master sitting on the case held the same position as a jury, and although in doubt about the master's findings, didn't wish to disturb them.

The case of *Berlin Mills Co. v. Croteau*, 88 Fed. 860, quoted on page 44 of Appellant's brief under the heading of *no evidence of actionable negligence*, holds that there is no duty imposed upon an owner to keep his premises in a suitable condition for those who come in solely for their own purposes without any inducement, and therefore the rules of master and servant do not apply. Wagner's goods were not on railroad premises.

In the case of *Bray v. Cove Irr. Dist.*, 86 Mont. 562, 284 Pac. 539, quoted on page 32 of Appellant's brief



under the heading of no evidence of negligence, and on page 44 under no evidence of actionable negligence, will say that the decision in this case was written by Judge Matthews, who wrote the decision in the Heckaman case. A reading of the Heckaman case will find many of the cases urged by Appellant cited. We have noted a few of those cases to show their absolute inapplicability to the facts in this case.

On page 54-62 of its brief, Appellant contends that the damages are not segregated. It contends under this heading as well as all the way through its brief, that all of Appellee's goods were damaged before the water ever reached the embankment, relying upon the testimony of Lillis, its engineer. We have dealt with the question of walls of water fully heretofore in this brief. We will content ourselves with saying, as was said in the case of *In re McCue*, 261 Pac. 341, 80 Mont. 537:

“It is true that courts are not compelled to accept as true, merely because someone swears they are true, statements which are so preposterous as not to be entitled to belief by any reasonable person.”

The court fully instructed the jury in this phase of the case (R. p. 812-813). In the Heckaman case an instruction embodying these principles was refused, and in passing upon this matter, the Supreme Court in the Heckaman case held:

“‘If the plaintiff is entitled to damages and the defendant liable for them, the one is not to be denied all damages, nor the other loaded with damages to which he is not legally liable, simply because the exact ascertainment of the proper amount is a

matter of practical difficulty.' The jurors 'must use their best judgment, and make their result, if not an absolutely accurate one, an approximation to accuracy.' (Sellick v. Hall, 47 Conn. 260.)

"If, in a given case, it is conceded or shown that damage would have resulted regardless of the existence of an embankment, but additional damage was suffered by reason of the negligent maintenance of the embankment, the plaintiff must produce evidence as to the amount of damage for which the defendant is liable. (Fort Worth Ry. Co. v. Speer, above.)

"However, the case at bar was not tried on the theory of segregable damages. The contention of the plaintiff was that the injury, in its entirety, was caused by water backed by reason of the insufficiency of the openings in the embankment, while the defendant pleaded and asserted that the damage was caused by a veritable "wall of water" which swept down the creek and engulfed the town of Wibaux before it reached the embankment.

"It was only in defendant's case, after all evidence as to the damage done was in, that the expert Shenehon testified that there would have been, according to his measurements, a foot and a half of water in the Heckaman place had there been no embankment, and the defendant seems to have placed no importance on the testimony. The testimony as to the actual conditions existing at the Massey place, a mile or more above Wibaux, where the relative elevation of the houses and the bottom of the creek correspond to those at Wibaux, but where the valley is much narrower than within the town, tends to refute this expert's computation."

In this case the Appellant contended that the embankment had nothing whatever to do with the damages. Of course, the Appellee contended, and proved by the evidence and physical facts, that there wouldn't have

been any damage to the Appellee's property had it not been for the embankment with insufficient openings therein. The Appellee sued for \$15,000 damages; the jury allowed him \$5,000. Certainly, they were reasonable in their computations.

On page 67-69 of Appellant's brief, contention is made that the verdict is contrary to the law as given by the court. The instructions of the court have to be construed as a whole (14 Ruling Case Law 817); and a reading of all of the charge of the court (R. p. 801-820) shows that the jury were justified in arriving at their verdict under this charge. Similar instructions were given in the Heckaman trial and sustained by the court in that case.

In connection with the rejection of the Government report mentioned on page 70-73 of Appellant's brief, there is nothing in the report that could aid the jury in any way. The report seems to be based on data obtained from local residents of the town of Wibaux and vicinity and is nothing more than hearsay evidence and is inadmissible. The specification of error does not quote any of the evidence or substance of the report as required by Rule 24 of Federal Appellate Procedure. If there was any matter relevant in this report, it was not segregated (R. p. 322-324) in connection with the introduction of this report.

The record shows that the vicinity of Wibaux and south of Wibaux was surveyed so thoroughly (to defeat this and other law suits arising out of this flood) by the engineers of Appellant, that the report covering



matters in the Little Missouri at Marmath, North Dakota, and other points over an area of several hundred miles, did not clarify or add to the situation. This report was rightly excluded.

On page 73 of its brief, Appellant contends that the 1900 high-water mark at its bridge was erroneous and that at the time of the Heckaman trial it had not checked the matter to determine if this record of the 1900 high-water was correct. With this high-water record before it, why did Appellant wait for a period of 31 years, or from 1900 to 1931, without investigating the matter? This is absolute proof that the Appellant paid no attention to high-water marks or any other notice. It apparently was satisfied as long as its bridge stood up, and it had little concern with the welfare or safety of the people south of its embankment in the town of Wibaux.

This case was fairly tried and properly submitted to the jury. In the Heckaman case, *supra*, it is held:

“In determining the sufficiency of the evidence to warrant a verdict, in compliance with the rules of law determining liability, heretofore stated, we are bound by the rule that the jurors are the triers of the facts, and, therefore, a verdict cannot be disturbed if there is, in the record, substantial evidence on which it may be sustained. (Harrington v. Mutual Life Ins. Co., 59 Mont. 261, 195 Pac. 1107; Ball v. Guessenhoven, 29 Mont. 321, 74 Pac. 871; White v. Barling, 41 Mont. 138, 108 Pac. 654; Cohen v. Clark, 44 Mont. 151, 119 Pac. 775.)

The contention of defendant is that if a bridge was sufficient to handle such ordinary high waters as

came before 1929 without damage to property in Wibaux, and particularly to the property where plaintiff had his business in 1929, then, the bridge was sufficient. This is not the law. It was not incumbent upon Appellee to prove damages perpetrated by the 1921 flood and all of the other floods testified to at this trial. As was said in the Heckaman case, *supra*:

“The general rule is quoted in *Reino v. Montana M. L. D. Co.*, 38 Mont. 291, 99 Pac. 853, as follows: ‘It is not required that the ‘specific’ injury or ‘such’ an injury as is complained of was or ought to have been specifically anticipated as the natural and probable consequence of the wrongful act. It is sufficient if the facts and circumstances are such that the consequences attributable to the wrongful conduct charged are within the field of reasonable anticipation; that such consequences might be the natural and probable results thereof, though they may not have been specifically contemplated or anticipated by the person so causing them.’”

Appellant has set out 3 specifications of error on page 8 of its brief. We have already dealt with specification of error No. 3, in connection with the rejection of Exhibit D-12, the Government report; and damages not segregated, raised in specifications of error No. 1 and No. 2, as appears on page 54 of Appellant’s brief; and verdict contrary to law, raised in defendant’s petition for a new trial as appears on page 67 of Appellant’s brief. We have been unable to find any other errors raised or urged under specifications of error No. 1 and 2 of Appellant’s brief, and, therefore, we presume they have been abandoned. Specifications of error

No. 1 and 2 are also contrary to Rule 24 of Federal Appellate Procedure. Nowhere in those specifications does it appear wherein the court erred in overruling defendant's motion for a directed verdict or overruling and denying defendant's petition for a new trial. For these reasons, we will not discuss the assignments of error from page 861-868 of the Record, excepting those we have already discussed.

In connection with the contention of Appellant on page 45-46 of its brief, in that the question of liability in this case is one of general law and that this court is not bound by the decision in the Heckaman case, will state that the theory of Appellee's case is founded on breach of Subsec. 5, Sec. 6507, hereinbefore set out; that this statute has been construed by the Montana Supreme Court in the Heckaman case, a case arising out of the same flood, and Heckaman's property and the Appellee's property are located exactly the same distance from the railroad and on the same elevation with the exception that the Appellee's property was higher as hereinbefore set out. The record in both cases is practically the same, with the exception that the record in this case is stronger than that of the Heckaman case. From a reading of the decision in the Heckaman case, it will be seen that the court gave all of the facts in the case and the law applicable thereto the most careful consideration.

A petition for a new trial in this case was filed with the lower court on May 14, 1934 (R. p. 825), and this matter was argued thoroughly by both sides on August 2, 1934; after more than 7 months' consideration of this



case, the lower court denied the motion on February 18, 1935 (R. p. 837), which shows that Judge Pray gave the facts in this case and the law applicable thereto the most careful consideration.

“The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply,” (Act of Sept. 24, 1789. Rev. St. paragraph 721.)

The case of New York Central and Hudson River R. R. Co. v. Brice, 159 Fed. 330, 16 L. R. A. (N. S.) 1908, states in the syllabus thereof:

“The Federal court will follow a state decision as to the duty of a railroad company to fence its tracks for the benefit of others than owners of adjoining land, under a statute of that state.”

The statute involved here is a matter within the police power of the state for the general benefit of the community at large. *Chicago & R. R. Co. v. Tranbarger*, 238 U. S. 678. We believe, therefore, that the decision in the Heckaman case should be controlling in this case.

In conclusion, the evidence in this case shows that the negligent construction of the embankment with insufficient openings therein was not only a contributing cause, but the sole cause of Appellee's damage. The width of the valley between high water marks at Burke's, 2 miles south of Wibaux, was 420 feet, the depth 16.1 feet, the vertical area going through, 4427 square feet. The width of the valley between high water marks at

Massey's was 600 feet, the depth 11.3 feet, the vertical area going through 3774 square feet. About 650 feet north of Massey's or 3,000 feet south of the railroad embankment, where Massey's horses stood, the width of the valley between high water marks was 1700 feet, the depth  $13\frac{1}{2}$  feet, the vertical area going through 9290,  $2\frac{1}{2}$  times greater than that at Massey's and over twice as much as that at Burke's. The width of the water between high water marks at Appellee's place of business 600 feet south of the embankment, 3,000 feet north of Massey's was 2650 feet, depth from low water 20 feet, depth from bottom of the creek 23 feet, 9 feet higher than at Massey's. Depth of the water 700 feet north of the embankment and viaduct on Main Street 15.5 feet, depth of the water at Lentz's place about 800 feet north of the bridge, 8.5 feet. All these facts coupled with the additional facts that there was no water in Massey's house, no water in Burke's house, and no water in Clem Parker's house, conclusively proves that the sole cause of Wagner's damage was the insufficient openings in the embankment.

We, therefore, respectfully submit that the judgment should be affirmed.

*Thomas L. Bolton*

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*Soundes Massey*

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Attorneys for Appellee.





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IN THE  
**United States Circuit Court**  
**of Appeals** ✓

FOR THE NINTH CIRCUIT.

No. 7876

---

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

*Appellant,*

vs.

OLIVIA WAGNER, as Administratrix with the Will Annexed of  
the Estate of Nick Wagner, Deceased.

*Appellee.*

---

**PETITION FOR REHEARING AND BRIEF  
AND ARGUMENT IN SUPPORT THEREOF.**

---

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**FILED**

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PAUL B. O'BRIEN



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**PETITION FOR REHEARING AND BRIEF  
AND ARGUMENT IN SUPPORT THEREOF.**

---

TO THE HONORABLE CURTIS D. WILBUR, BERT  
EMORY HANEY AND WILLIAM DENMAN, CIRCUIT  
JUDGES:

The defendant and appellant hereby petitions for a rehearing in this case for the reasons and upon the grounds following:

1. That the statement of facts in the opinion upon which the Court predicated its conclusion that "there is substantial evidence justifying a finding by the jury that the company negligently failed to maintain an adequate opening in its em-

bankment," is unsupported by the evidence and, in fact, is contrary to all the evidence.

2. The Court having found and determined that the flood in question was "unprecedented in volume and extent" there was no duty on the part of the defendant to anticipate and guard against the same and the Court was clearly in error in holding that the question of whether the defendant should have anticipated such a flood was a question for the jury, and in so holding either misread or misconstrued the opinion in the Heckaman case, which is cited, and apparently overlooked the case of Eikland v. Casey, 290 Fed. 880, decided by this Court.

3. The Court having decided that the flood in question was an unprecedented flood, the questions of actionable negligence and proximate cause presented and discussed in the brief for appellant should have been considered in arriving at a proper decision of the case.

4. Rule applied in Salton Sea Cases, 172 Fed. 792, 819, is not applicable to the facts of this case.

## **BRIEF AND ARGUMENT**

### **I.**

#### **STATEMENT OF FACTS IN OPINION INCORRECT**

The vital and controlling question is whether the defendant provided sufficient openings or passage-ways for the flow of water through its railroad embankment to satisfy the requirement of the law in this regard. In the opinion it is said:

"Beaver Creek, in eastern Montana, flows in a northerly direction through the town of Wibaux. On the north side of the town, the company's railroad runs east and



west upon an embankment. Where it crosses the creek, it was supported, at the time of the flood, by a concrete bridge fifteen to twenty feet in height above the bed of the creek. The central span of the bridge was about sixty-five feet wide at the bottom and one hundred feet at the top. In addition there was on either side of the central span a twenty-foot approach span. These latter, however, were filled in before the time of the flood and allowed no egress to surplus water in the creek. In addition to the space under the bridge, there was a small 'viaduct' or opening in the embankment some distance from the bridge which was used as a passage-way for children in normal times, and acted as a spillway in periods of high water."

The Court has completely overlooked the pleadings and evidence with reference to what is termed the viaduct over Wibaux Street, a distance of about 500 feet west of the bridge in question.

In the answer of the defendant it is alleged:

"That in 1912, the defendant company, at the request of the Council of said town of Wibaux, constructed a viaduct or under-ground crossing thru said grade or embankment at a point about 500 feet west of said railway bridge over said Beaver Creek, which viaduct was about 35 feet wide at the bottom and 70 feet wide at the top, and about 15 feet high; that said viaduct was constructed for use as a street crossing from the south side to the north side of said grade or embankment; that said viaduct is so situated that it did also carry off flood waters of Beaver Creek during the high water of June, 1929." (R. p. 34.)

The replication admits this allegation as follows:

"Admits that in 1912 the defendant railway company constructed a viaduct through said grade or embankment at a point about 500 feet west of said road bridge over said Beaver Creek Valley, which viaduct was about 35 feet wide at the bottom and 70 feet wide at the top and about 15 feet high. That said viaduct was constructed for use as a street crossing from the south side to the north side

of said embankment. That it did carry off some flood water during the high water of June, 1929." (R. p. 41.)

There are over 90 references to this viaduct in the testimony contained in the record. It is shown on the large relief map introduced in evidence and is distinctly marked as "Bridge over Wibaux Street" on the plat or map made a part of the brief for appellant.

The witness Lyman, who was the expert and principal witness for the plaintiff, testified:

"When the water was going thru the bridge so that the entire capacity of the bridge was taken up, there was a lot of water going thru the viaduct." (R. pp. 793-794.)

"In addition to the water that went thru the bridge over Beaver Creek on the day of the flood, I am satisfied that a tremendous volume of water went from the south of town to the north of town under the so-called viaduct; that was additional water to what went thru the bridge." (R. p. 312.)

Mr. Lyman further testified that the water was passing thru the viaduct at the rate of 18 feet per second. (R. p. 794.)

He also testified:

"I think the opening to the rails on the top of the viaduct would perhaps have 500 square feet of area in it; and 500 times 18 is 9000." (R. p. 796.)

When it is considered that the viaduct was 35 feet wide at the bottom, 70 feet wide at the top and 15 feet high, as admitted in the pleadings, the area of 500 square feet used by Mr. Lyman is much less than the actual area.

The small "viaduct" referred to in the opinion, and which the Court says "acted as a spill-way in periods of high water," is shown on the large relief map and also on the plat or map made a part of appellant's brief, and is designated as "school under-pass."

This so-called viaduct is situated at an elevation where no water passed thru it in the flood of 1929, and no water has ever passed thru it.

\* \* \* \* \*

The statement in the opinion that "The central span of the bridge was about 65 feet wide at the bottom and 100 feet at the top" and that "in addition there was on either side of the central span a twenty-foot approach span" is clearly an error and contrary to all the evidence. The witness Lyman, who, as before stated, was the expert and principal witness for the plaintiff, testified as follows:

"The railroad company's bridge as it existed there on June 7, 1929, consisted of one 70 foot span with two approach spans of 20 feet." (R. p. 275.)

The witness M. F. Clements, who described the model of the bridge introduced in evidence, testified that the bridge, as it existed at the time of the flood, had a 70-foot central span and an additional twenty foot span at each end (R. p. 580.) The model of the bridge introduced in evidence also conforms to these measurements.

\* \* \* \* \*

The statement in the opinion that these additional or twenty foot approach spans were filled in before the time of the flood and "allowed no egress to surplus water in the creek" is also contrary to all of the evidence. The witness Lyman testified:

"The approach spans had been filled on a slope down from the top of the abutment to the base of the pier, leaving a clear water way of about 65 feet between piers, plus a triangle under each approach span as the water got high." (R. pp. 275-276.)

This is also the testimony of the witness Clements (R. pp.



585 & 591.) He testified that the fill in the approach spans had a slope of  $1\frac{1}{2}$  to 1.

Furthermore, the model of the bridge introduced in evidence and which is admitted to be correct, shows the triangle opening under each of these approach spans.

The witness Sutherland for the plaintiff, who testified to the filling up of these approach spans, said:

“It was filled in on those approaches from the base of the piers clear up to the top of the grade *on a slant.*” (R. p. 159.)

While the opening beneath these approach spans could not be used as a passage-way for teams or vehicles, they nevertheless, afforded a passage-way for water.

\* \* \* \* \*

It is not surprising that the court, having erroneously assumed that the approach spans had been completely filled so that no water could pass thru them, and having completely overlooked the underpass or viaduct at Wibaux Street, concluded, as stated in the opinion, that “there is substantial evidence justifying a finding by the jury that the company negligently failed to maintain an adequate opening in the embankment.”

According to all of the testimony approximately one-half of the space beneath each of the approach spans was open for the passage of water. This would be equivalent to a twenty-foot opening. When to this is added the area of the opening at the viaduct at Wibaux Street, which was 35 feet at the bottom, 70 feet at the top, and 15 feet high, and the area of the opening or passage-way beneath the main span of the bridge over Beaver Creek, we find that the openings in the embankment aggregated more than 115 feet in length, which the witness Lyman

testified would be sufficient. The witness Lyman was the only witness for the plaintiff who expressed an opinion as to the passageway for water thru the embankment, which should have been provided. He testified as follows:

“Q. Mr. Lyman, having heard all of the testimony of the defendant’s witnesses here as to the bridge, what is your opinion as to whether any water would have gotten into the building shown to have been occupied by Nick Wagner on June 6 and 7, 1929, if there had been a bridge with openings 115 feet at Beaver Creek by the Northern Pacific Railway?

A. I believe there would have been very little, if any.

Q. By ‘very little’ how much?

A. I am very doubtful whether there would have been any. I wouldn’t say whether it would have hit the floor of that building, perhaps. As to whether, in my opinion, it could have gotten above the floor, will say that no one could tell that right down to a fine point. My opinion is, I don’t believe it would have gotten to his floor.” (R. pp. 787-788.)

## II.

### NO DUTY TO ANTICIPATE AND GUARD AGAINST UNPRECEDENTED FLOOD.

In the opinion in the instant case the court said:

“It quite clearly appears that the flood of June 7, 1929, was much more serious in its consequence to the town of Wibaux than any that had preceded it. On this occasion, apparently, a number of cloudbursts which ordinarily would occur at more widely separated points poured their waters at the same time into Beaver Creek and its tributaries. But the mere fact that the flood was unprecedented in volume and extent does not relieve the defendant from liability. The Salton Sea Cases (C. C. A. -9), 172 Fed. 792, 819. The region’s susceptibility to deluges was known to the defendant. Whether it was chargeable with anticipation of a flood the volume of the one in question was an

issue to be resolved by the jury. Such was the holding of the Supreme Court of Montana in a case arising against this defendant as a result of the same flood as the one now under consideration. *Heckaman v. Northern Pac. Ry. Co.*, 93 Mont. 363, 382."

The court clearly misread or misconstrued the opinion in the Heckaman case. In that case the court held the Montana Statute to require a railroad embankment to be so constructed "as to allow for the passage of such water as was known to flow in the stream in time of usual freshets and such as might have reasonably been expected to in floods which are not usual but which experience shows might occur at any time." (Opinion p. 377.)

The court in the opinion in the Heckaman case further said:

"If a railroad corporation, in the construction and maintenance of its grade, bridges and culverts, has fully discharged the duty heretofore outlined, yet damage results from the insufficiency of the openings to carry away waters which come to it as the result of an unprecedented storm and consequent flood, there is no liability, as the necessary element of negligence is lacking. (Citing cases.) This is the only reasonable rule under such circumstances, for the term 'unprecedented' means 'novel, new, unexampled' (Webster's New Int. Dict.); *an act of God which no one can anticipate or guard against.*" (Italics ours.)

The court further said:

"Conceding that the storm of 1921 was 'unprecedented' and might not, under the authorities cited by counsel for defendant, be notice that a like or greater storm might thereafter occur, the evidence epitomized above is sufficient to warrant the finding that the openings in the embankment were, to the knowledge of the defendant, insufficient to permit the waters of Beaver Creek '*in ordinarily recurring high water*' to flow down the natural channel of the creek, and, consequently, establishes the violation by the defendant of the mandate of section 6507, above, in that



the defendant did not restore the stream to its original usefulness, as near as may be.

This antecedent and concurrent negligence is shown, and, as above pointed out, the evidence clearly shows that the damage done the plaintiff was 'in whole or in part', and perhaps wholly, due to this negligence. *It follows that the fact that the flood of 1929 was unprecedented is no defense, and the verdict and judgment are warranted by the evidence.*" (Italics ours.)

It thus appears that the court did not decide in that case that whether the defendant should have anticipated and guarded against the flood of 1929 was an issue for the jury. What the court did decide was that there was no duty on the part of the defendant to anticipate and guard against the 1929 flood, which it found to be an unprecedented flood. The verdict of the jury was sustained upon the ground that there was sufficient evidence in that case "to warrant the finding that the openings in the embankment were to the knowledge of the defendant insufficient to permit the waters of Beaver Creek 'in ordinarily recurring high water' to flow down the natural channel of the creek," and that this negligence concurring with the unprecedented flood rendered the defendant liable. The court, recognized the rule that where the negligence of the defendant concurs with an act of God, there is no liability for the damage resulting from the act of God, and that the damages should be segregated. The court, however, decided that the trial court did not err in refusing an instruction with reference to segregation of damages, for the reason, as stated in the opinion, (p. 388), "the case was not tried upon the theory of segregable damages."

As a matter of fact, the Supreme Court of Montana in the case of *Lyon v. Chicago, etc. Ry. Co.*, 45 Montana. 33, had de-

cided that an instruction which submitted to the jury the question of whether the defendant should have anticipated and guarded against an unprecedented flood was erroneous. In the opinion in that case the Court said:

“However, the court also gave this instruction: ‘No. 10. You are further instructed that by the act of God is meant those events and accidents which proceed from natural causes and cannot be reasonably anticipated or guarded against, such as unprecedented freshets, floods, earthquakes, cyclones, lightning, and such like. *For injuries occurring by any of these means, there is no liability, provided reasonable and ordinary care is exercised to guard against such occurrences.*’ In our judgment, this instruction does not correctly state the law. It, in effect, declared the defendants responsible for failure to anticipate and guard against an act of God. We quote with approval the following language taken from the opinion of the court in *Kansas City P. & G. R. Co. v. Williams*, 3 Ind. Ter. 352, 58, S. W. 570: ‘The rule of law in such cases is that the defendant is only required to take precautions against *ordinary storms* which occur in the vicinity; and if the damage would have occurred by the act of God, notwithstanding the obstruction, even if there were negligence on the part of the defendant, damages cannot be recovered. \* \* \* In this case, unlike most cases in which the act of God is invoked as a defense, the act of negligence did not occur during the storm, or after it was over. Therefore the act is only made a negligent act by comparison with the duty which defendant owed before the storm. *It was not defendant’s duty to foresee and prepare against an unprecedented storm; in other words, it was not defendant’s duty to prepare against ‘the act of God.’ Its duty was only to prepare against ordinary storms.*’ (Italics ours.)

The case of *Lyon v. Chicago, etc. Ry. Co.*, 45 Mont. 33, was cited approvingly by this Court in the case of *Eikland v. Casey*, 290 Fed. 880, 883.

In the case of *Radburn v. Fir Tree Lumber Co.*, 145 Pac. (Wash.) 632, the court said:

“But the law does not put upon men who are engaged in the prosecution of rightful enterprises the duty of anticipating that which is unprecedented, or which has not occurred in the memory of man.”

See also cases cited in appellant’s brief, pp. 9, 10, 30 and 31.

Authorities might be multiplied indefinitely holding that there is no duty to anticipate and guard against an unprecedented flood, or any act of God. In fact, this Court, in the case of *Eikland v. Casey*, 290 Fed. 880, said:

“Surely plaintiffs cannot complain if the verdict was reached upon the ground that the damages were caused by an inevitable accident, as the result of vis major or act of God, against which one cannot reasonably be expected to guard,”

It is, of course, for the jury to say, where there is a conflict in the testimony, whether a flood was unprecedented, but where, according to all of the evidence, the flood was unprecedented, it is the duty of the Court to declare as a matter of law that the failure to anticipate and guard against such a fortuitous event does not constitute negligence.

It is inconsistent and contradictory to say that an unprecedented flood or act of God should be anticipated and guarded against. The very definition of an act of God is that it is something which no one can anticipate or guard against.

### III.

#### THE COURT SHOULD HAVE CONSIDERED QUESTION OF ACTIONABLE NEGLIGENCE AND THE QUESTION OF PROXIMATE CAUSE.

The Court having found that the flood of 1929 was an un-



precedented flood, from which it follows that the defendant is not liable for any damage occasioned thereby, the Court should have considered the question of actionable negligence, discussed in the brief for appellant on pages 42 to 48.

It is not a question of whether the stream was restored to its former state of usefulness, generally speaking, but the question for determination is whether the restoration was such as to discharge the duty owing to the plaintiff. The plaintiff cannot complain except of negligence affecting his property.

There is no evidence that the railroad embankment ever retarded the flow of the water, even during the flood of 1921, so as to affect the property of the plaintiff.

The Court having found that the flood of 1929 was an unprecedented flood and there being no duty to anticipate and guard against such a flood, the defendant is not liable even though the failure to provide sufficient openings in the railroad embankment contributed to the damage, provided plaintiff's property would not have been damaged by any flow of water which should have been reasonably anticipated. The rule with reference to such a situation is stated by this Court in the case of *Eikland v. Casey*, 290 Fed. 880, 883. In the opinion it is said:

“Surely plaintiffs cannot complain if the verdict was reached upon the ground that the damages were caused by inevitable accident, as the result of vis major or act of God, against which one cannot reasonably be expected to guard, provided the correct rule applicable was stated, as it was in substance: That if it were found that the construction of the bulkhead or flume contributed to or caused the damage complained of, and such result could not have been reasonably anticipated or foreseen, verdict should be for the defendants; but that, if the damage

could have been reasonably anticipated as resulting from the construction of the bulkhead or flume, defendants would be liable.”

The railroad embankment was constructed in 1881 and had been in existence 48 years before this flood in 1929. During that entire time the openings provided had been amply sufficient to prevent the retarding of the flow of water in Beaver Creek to the extent of causing any impounded water to reach the elevation of the site or land upon which the plaintiff's property is situated or to in any manner damage the property of the plaintiff. Under these circumstances, according to all of the authorities, defendant was not required to anticipate and guard against a flow of water in Beaver Creek in excess of the greatest flow during a period of forty-eight years.

The openings in the embankment, although they may not have been sufficient for the flood of 1929, are not the proximate cause of the damage suffered by plaintiff.

Cole v. German Savings & Loan Society, 124 Fed. (8th Cir.) 113, and other cases cited on pages 48 to 54 of appellant's brief.

#### IV.

##### SALTON SEA CASES.

The rule applied in the Salton Sea Cases, 172 Fed. 792, 819, cited by the Court is not applicable to the facts of this case. Those cases involved a claim for damages resulting from the diversion of the water of the Colorado river into the canal of the defendant. In the opinion, the Court said:

“The diversion of the river was made by the defendant and made in such a negligent manner that it resulted in the injury complained of. \* \* \* Under the conditions prevailing in that locality and known to have existed for many

years, it was the duty of the defendant to have maintained proper control of the water at its head-gates.”

The Court further said :

“The evidence shows conclusively that it was defendant’s method of constructing the intakes that resulted in turning the flood of the Colorado river into the Salton sink.”

It was in view of these findings that the Court decided that notwithstanding “an extraordinary flood came down the river contributing to the disaster,” the defendant was liable.

The difference between the Salton Sea Cases and the instant case is that in those cases the extraordinary flood would not have contributed to the damage except for the negligence of the defendant, whereas in the instant case there would have been no damage except for the unprecedented flood.

The rule applied in the Salton Sea Cases is well stated by the Supreme Court of Montana in the case of *Raish v. Orchard Canal Co.*, 67 Mont. 140-146. That case involved a claim for damages resulting from the over-flow of a canal, which it was alleged was caused by the negligent construction or maintenance of the headgate. It was contended, as a defense, that the over-flow of the canal was due to an extraordinary flood. The Court, in the opinion, said :

“However, it is equally well settled that whenever two causes combine proximately to produce an injury, the one being a culpable negligent act of the defendant and the other an act of God for which neither party is responsible, the defendant is liable for such loss as is caused by his own act concurring with the act of God, *provided the loss would not have been sustained by plaintiff but for such negligence of defendant.*” (Italics ours.)

See also : 45 Corpus Juris, p. 939.



Wherefore petitioner prays that a rehearing be granted and a re-argument of the case had.

Respectfully submitted,  
FREDERIC D. McCARTHY,  
JOHNSTON, COLEMAN & JAMESON,  
GUNN, RASCH & HALL,

Attorneys for Appellant.

THIS IS TO CERTIFY that in my judgment the foregoing petition for a rehearing is well founded and that it is not interposed for delay.

M. S. GUNN,  
Attorney for the Northern Pacific  
Railway Company, Appellant.



United States  
Circuit Court of Appeals  
For the Ninth Circuit. 6

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CHARLES LORAIN BRYMER,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Northern Division.





No. 8010

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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CHARLES LORAIN BRYMER,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the Western District of Washington,  
Northern Division.





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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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(To be retained by clerk)

## UNITED STATES OF AMERICA

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Petition for Naturalization

To the Honorable the U. S. Dist. Court of W. Dist.  
of Wash. at Seattle, Wash.

The petition of Charles Loraine Brymer, hereby  
filed, respectfully shows:

(1) My place of residence is 3220 Alki Ave.,  
Seattle, Wn.

(2) My occupation is Laborer.

(3) I was born in York Co. N. B. Canada on  
Nov. 30, 1874. My race is Scotch.

(4) I declared my intention to become a citizen  
of the United States on Aug. 27, 1928 in the U. S.  
Dist. Court of West Dist. of Washington, at Se-  
attle, Washington.

(5) I am not married. I have no children.

(6) My last foreign residence was New Aunan,  
Nova Scotia, Canada. I emigrated to the United  
States of America from Oxford, Nova Scotia,  
Canada. My lawful entry for permanent residence  
in the United States was at Sumas, Washington,  
under the name of Charles Brymer on Oct. 20, 1907,  
on the vessel C. P. R. as shown by the certificate of  
my arrival attached hereto.

(7) I am not a disbeliever in or opposed to  
organized government or a member of or affiliated  
with any organization or body of persons teaching  
disbelief in or opposed to organized government. I



am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. It is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to George V. by the Grace of God, of Great Britain, Ireland, and the British Dominion beyond the Seas, King, Defender of the Faith, Emperor of India, of whom at this time I am a subject, and it is my intention to reside permanently in the United States.

(8) I am able to speak the English language.

(9) I have resided continuously in the United States of America for the term of five years at least immediately preceding the date of this petition, to wit, since October 20, 1907 and in the County of King this State, continuously next preceding the date of this petition, since 1908, being a residence within said county of at least six months next preceding the date of this petition.

(10) I have heretofore made petition for Naturalization: Number 17250, on March 11, 1931 at Seattle, Washington and such petition was denied by that Court for the following reasons and causes, to wit: Incompetent Witness and the cause of such denial has since been cured or removed.

Attached hereto and made a part of this, my petition for citizenship, are my declaration of intention to become a citizen of the United States, certificate

from the Department of Labor of my said arrival, and the affidavits of the two verifying witnesses required by law.

Wherefore, I, your petitioner, pray that I may be admitted a citizen of the United States of America, and that my name be changed to.....

I, your aforesaid petitioner being duly sworn, depose and say that I have read/heard read this petition and know the contents thereof; that the same is true of my own knowledge except as to matters herein stated to be alleged upon information and belief, and that as to those matters I believe it to be true; and that this petition is signed by me with my full, true name.

CHARLES LORAIN BRYMER

(Complete and true signature of petitioner)

#### AFFIDAVITS OF WITNESSES.

Emil Shanno, occupation Cafe Prop., residing at 2758 Alki Ave., Seattle, Washington, and F. G. Camatta, occupation Mill Wright, residing at 3219-B-2, Renton Place, Seattle, Washington, each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known and has been acquainted in the United States with Charles Loraine Brymer, the petitioner above mentioned, since Dec. 19, 1928 and that to his personal knowledge the petitioner has resided in the United States continuously preceding the date of filing this petition, of which this affidavit is a part, to wit, since

the date last mentioned, and at Seattle, in the County of King this State, in which the above-entitled petition is made, continuously since Dec. 19, 1928, and that he has personal knowledge that the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and that in his opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

EMIL SHANNO

(Signature of witness)

F. J. CAMATTA

(Signature of witness)

Subscribed and sworn to before me by the above-named petitioner and witnesses in the office of the Clerk of said Court at Seattle this 20th day of Dec., Anno Domini 1933. I hereby certify that certificate of arrival No. 20-7897 from the Department of Labor, showing the lawful entry for permanent residence of the petitioner above named, together with declaration of intention No. 31372 of such petitioner, has been by me filed with, attached to, and made a part of this petition on this date.

No. 35794.

ED M. LAKIN

[Seal]

Clerk.

By L. B. MILLARD

Deputy Clerk. [1\*]

20006

CHARLES LORAINÉ BRYMER



10/18/35. Rec'd 5.00 fee, notice of appeal.  
10/18/35. Filed praecipe.  
10/17/35. 200.00 deposited with Clerk and appeal  
bond filed.

OATH OF ALLEGIANCE.

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to George V, by the Grace of God, of Great Britain, Ireland, and the British Dominions beyond the Seas, King, Defender of the Faith, Emperor of India, of whom I have heretofore been a subject; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: SO HELP ME GOD. In acknowledgment whereof I have hereunto affixed my signature.

.....  
(Signature of petitioner)

Sworn to in open court, this ..... day of  
....., A. D. 19.....

ED M. LAKIN, Clerk.

Petition continued from 3/24/34

Reason: Wits. Examined. Court not satisfied  
with their testimony. Examiner Tyler asks for

ruling on request for conviction and sentence without pardon (Colorado conviction of wilfull manslaughter committed in 1894 (served 1895 to 1901) no pardon. Cont'd to April 28, 1934 for examiner to present list of cases supporting his request.

May 6, 1935 Motion *ot* T. D. Page, Atty. R. W. Thomas, examiner, not objecting, passed to June 3, 1935 at 2 P. M. 6/3/35 Petitioner further examined. Emil Shanno further testifies. R. A. Wilson, sworn, testifies character, etc. Petition denied. Order to be settled June 12, at noon. Given Exhibit 1, Copy commitment of conviction in file Immigration record. June 8, 1935, Ent; Order continuing hearing to July 1st, at 2 P. M. July 1, 1935, Passed to Oct. 7, 1935. Oct. 7, 1935 Order denying admission signed. Petr. exception to order allowed. R. W. Thomas and T. D. Page, atty, present. Petr. gives notice of appeal. Files petition and assignment of errors. Order allowing appeal and citation signed. Order fixing appeal bond \$200.00 signed.

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Petition No. 20006

U. S. District Court

In the Matter of the Petition of CHARLES LORRAINE BRYMER To be Admitted a Citizen of the United States of America.

AFFIDAVIT OF WITNESS.

Ray A. Wilson, occupation Post Office Employee, residing at 1012 Belmont Ave. N. Seattle, Washington,

being severally duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known and has been acquainted in the United States with Charles Loraine Brymer the petitioner above mentioned since Dec. 19, 1928, and that to his personal knowledge the petitioner has resided in the United States at Seattle, in the County of King State of Washington, from Dec. 19, 1928 to June 4, 1935, and that he has personal knowledge that the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and that in his opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

RAY A. WILSON

(Signature of witness)

Subscribed and sworn to before me by the above-named witness at Seattle, this 4th day of June, anno Domini 1935.

EDGAR M. LAKIN

Clerk U. S. District Court

By L. B. MILLARD, Deputy. [2]



In the United States District Court of Washington,  
Western District, at Seattle.

No. 20006.

In the Matter of the Petition of CHARLES  
LORAIN BRYMER To Be Admitted As a  
Citizen of the United States of America.

### ORDER.

This cause having come on for hearing in open court the 3rd day of June, 1935, with the petitioner and his two witnesses being present, and the United States Immigration and Naturalization Service being represented by R. W. Thomas, Naturalization Examiner, and the petitioner, by his Attorney, T. D. Page.

The petitioner, Charles Loraine Brymer, an alien, filed petition for citizenship No. 20006 in this court wherein he stated he was born in York County, New Brunswick, Canada, November 30, 1874, and arrived in the United States through Sumas, Washington under the name of Charles Brymer, on October 20, 1907, on the C. P. R.

At the hearing on his petition for citizenship, he testified he first arrived in the United States through the State of Maine during the year 1892 and resided continuously in the United States until the year 1906 when he returned to Canada, the country of his nativity. He made a reentry into the United States through Sumas, Washington on October 20, 1907 and has resided continuously in

the United States since his reentry as aforesaid. That during his first period of residence in the United States, from about 1892 to 1906, he was arrested in the state of Colorado, charged with the crime of murder. That he was convicted by a jury in the District Court of Park County, State of Colorado, of the crime of voluntary manslaughter, and by the said court was sentenced to the Colorado State Penitentiary at Cannon City on November 9, 1895, there to be confined for a term of eight years at hard labor. That he was discharged from said penitentiary on January 30, 1901 by reason of expiration of his sentence.

It appears under the Immigration Act of February 20, 1907, in effect at the time of the alien's reentry into the United States, [3] provides in Section 2 thereof that the said alien was one of the Classes excluded from admission into the United States as being a person who has been convicted of a felony or other crime or misdemeanor involving moral turpitude.

That said Section 2 of the Act of February 20, 1907, was incorporated into and made a part of the Immigration Act of February 5, 1917, as Section 3, Section 19 of said Act of February 5, 1917, relating to the matter of deportation of aliens entering or found in the United States in violation of law provides that any alien who was convicted, or who admits the commission, prior to entry, of a felony, or other crime or misdemeanor involving moral turpitude shall be applicable to the classes of aliens

therein mentioned irrespective of the time of their entry into the United States.

And the court being fully advised in the premises, it is the order of this court that the said petition for citizenship of the said Charles Loraine Brymer, be, and the same is hereby denied on the ground that his reentry into the United States on October 20, 1907, was unlawful and in violation of the U. S. Immigration law in effect at the time of said entry.

Done at Seattle, Washington, in open court, this 7th day of October, 1935.

EDWARD E. CUSHMAN

Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 7, 1935. Edgar M. Lakin, Clerk, by F. W. Moses, Deputy. [4]

---

[Title of Court and Cause.]

#### ASSIGNMENT OF ERRORS.

Comes now Charles Loraine Brymer and by his attorney in support of his appeal now petitioned for herein, and submits the following assignments of error as bases for reversal of that certain Order entered herein on October 7, 1935 denying Petitioner's application and petition for citizenship herein filed:



1.

That the Court erred in making and entering its Order of October 7, 1935, denying the petition of petitioner for admission to citizenship in the United States of America, to which Order petitioner noted exception and exception allowed.

2.

That the Court erred in denying petitioner's application and petition for citizenship in the United States of America.

Dated at Seattle, Washington, October 7, 1935.

THOMAS D. PAGE

Attorney for petitioner.

Copy received: October 7, 1935.

R. W. THOMAS

Naturalization Examiner

J. CHARLES DENNIS

U. S. Attorney

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 7, 1935. Edgar M. Lakin, Clerk, by F. W. Moses, Deputy. [5]

In the United States District Court for the Western  
District of Washington, Northern Division.

No. 20006.

In the Matter of the Petition of CHARLES  
LORAIN BRYMER, To Be Admitted As a  
Citizen of the United States of America.

### PETITION FOR APPEAL.

Comes now the petitioner, CHARLES LORAIN BRYMER, and having heretofore filed herein his Assignments of Error, hereby gives notice that he appeals to the Circuit Court of Appeals for the 9th Circuit at San Francisco, California, from that certain Order entered and filed herein on October 7, 1935, whereby the Court did deny the application and petition of petitioner for citizenship in the United States of America after hearing before the said Court, to which Order petitioner did note exception and exception allowed, and that petitioner hereby respectfully prays that *he* appeal herein be allowed.

Dated this 7th day of October, 1935, at Seattle, Wash.

THOMAS D. PAGE

Attorney for petitioner.

Copy received:

R. W. THOMAS

Naturalization Examiner

J. CHARLES DENNIS

U. S. Attorney

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 7, 1935. Edgar M. Lakin, Clerk, by F. W. Moses, Deputy. [6]

---

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

This matter having come on before the undersigned Judge of the above entitled Court this day on the petition of Charles Loraine Brymer for an order allowing an appeal herein and the Court being advised, it is

NOW, THEREFORE, ORDERED that the petition for an order allowing appeal herein from that certain order entered herein on October 7, 1935, denying the petition of Charles Loraine Brymer for citizenship, be and same is hereby allowed and that citation may forthwith issue.

Done in open court this 7th day of October, 1935.

EDWARD E. CUSHMAN

U. S. District Judge.

O. K.

R. W. THOMAS

Naturalization Examiner.

J. CHARLES DENNIS

U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 7, 1935. Edgar M. Lakin, Clerk, by F. W. Moses, Deputy. [7]



[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,  
Western District of Washington,  
Northern Division—ss.

The President of the United States of America,  
to J. Charles Dennis, United States Attorney  
for the Western District of Washington, and  
to R. W. Thomas, United States Naturaliza-  
tion Examiner,

GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the 9th Circuit to be holden at the City of San Francisco, California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the Clerk of the United States District Court, for the Western District of Washington, at Seattle, Washington, wherein CHARLES LORAIN BRYMER is Appellant and show cause, if any there be, why the Order Denying Citizenship in the United States of America to the said Charles Loraine Brymer heretofore entered herein in the said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

WITNESS the Honorable Edward E. Cushman, Judge of the United States District Court for the Western District of Washington, sitting in the Northern Division of said District at Seattle, this 7th day of October, 1935.

EDWARD E. CUSHMAN

United States District Judge.

Copy Received.

R. W. THOMAS

Naturalization Examiner.

J. CHAS. DENNIS

U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 7, 1935. Edgar M. Lakin, Clerk, by F. W. Moses, Deputy. [8]

---

[Title of Court and Cause.]

ORDER FIXING AMOUNT OF BOND  
ON APPEAL.

This matter having come on regularly before the undersigned Judge of the above entitled Court this day on application of CHARLES LORAIN BRYMER, by his attorney, for an order fixing amount of bond on appeal herein, and an order having been heretofore entered allowing appeal herein, it is

NOW THEREFORE ORDERED that the amount of bond to be filed herein on appeal be and it shall be in the principal sum of Two Hundred and No/100 (\$200.00) Dollars, executed by the petitioner CHARLES LORAIN BRYMER, as Principal, with good and sufficient surety or sureties thereon in accordance with law to be first approved by the Court and filed herein and it is

~~FURTHER ORDERED~~ that upon the filing of said bond as hereinabove provided, all proceedings herein shall be stayed pending decision of the United States Circuit Court of Appeals for the 9th Circuit at San Francisco, California, on matters presented by the appeal herein being prosecuted by petitioner as appellant. E.E.C.

Done in open court this 7th day of October, 1935.

EDWARD E. CUSHMAN

U. S. District Judge.

Copy received and approved; October 7, 1935.

R. W. THOMAS,

Naturalization Examiner.

J. CHAS. DENNIS

U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 7, 1935. Edgar M. Lakin, Clerk, by F. W. Moses, Deputy. [9]

---

[Title of Court and Cause.]

HEARING (MINUTE ENTRY)

Now on this 7th day of October, 1935, Richard Thomas, Assistant District Director of Naturalization, appearing for the government and Mr. Page appearing for the petitioner, this cause comes on for presentation of order denying petition. The order denying admission is signed. The petitioner's



exception to the order is allowed. The petitioner gives notice of appeal and files petition and assignment of errors. An order allowing appeal and citation is signed. An order fixing appeal bond in the sum of \$200.00 is signed. Leave to withdraw immigration file is granted. The Clerk is to be receipted for any record withdrawn. [10]

---

[Title of Court and Cause.]

COST BOND ON APPEAL.

That I, CHARLES LORAIN BRYMER, as principal, have this day caused to be deposited with the Clerk of this Court, the sum of Two Hundred (\$200.00) Dollars, lawful money of the United States of America, as security and acknowledged myself indebted and primarily bound to the United States of America in the sum of Two Hundred (\$200.00) Dollars, to be levied upon the said Two Hundred (\$200.00) Dollars so deposited upon this condition:

WHEREAS, the said Charles Loraine Brymer has appealed from that certain order, entered and filed herein on the 7th day of October, 1935, whereby this court did deny the application and petition of petitioner for citizenship in the United States of America, after hearing before the above entitled Court, such appeal being to the United States Circuit Court of Appeals for the Ninth Circuit Court at San Francisco, California.

Now, therefore, if the said Charles Loraine Brymer shall prosecute his said appeal with effect and diligence and personally, and on further condition that he shall abide by and perform any order or judgment which may be rendered on appeal herein, and shall pay all of the costs and disbursements of this proceeding, including costs on appeal in the event of either affirmance or reversal of said order on appeal, then this obligation to be void; otherwise to remain in full force, effect and virtue. [11]

It is further stipulated that said sum of Two Hundred (\$200.00) Dollars shall remain with the Clerk of this court until this obligation is fully completed.

Witness my hand and seal this 16th day of October, 1935.

CHARLES LORAIN BRYMER.

State of Wash.,  
County of King.—ss.

Comes now your affiant, and upon oath deposes and says: that he has read the above statement, knows the contents thereof, and believes the same to be true.

CHARLES LORAIN BRYMER.

Subscribed and sworn to before me this 16th day of October, 1935.

[Seal]

LOUIS HAVEN

Notary Public in and for the State of Washington, residing at Seattle.

Approved:

JOHN C. BOWEN

Judge.

Approved:

J. CHAS. DENNIS

U. S. Attorney.

Copy received. Oct. 17, 1935.

M.R.O.      ?

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Oct. 17, 1935. Edgar M. Lakin, Clerk, by F. W. Moses, Deputy. [12]

---

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the above entitled court:

The appellant above named respectfully requests that you prepare and properly certify a transcript of the following papers, orders, decrees and proceedings filed and had in this cause for the purpose of appeal in the above entitled cause to the United States Circuit Court of Appeals, Ninth Circuit, namely:

1. Original petition of Citizenship Chas. Loraine Brymer, together with minutes on back of same.
2. Affidavits of Witness:  
Ray Wilson  
Emil Shanno



3. Order of Oct. 7th 1935 denying citizenship.
4. Assignment of Errors.
5. Petition for Appeal.
6. Order Allowing Appeal.
7. Citation on Appeal.
8. Order fixing amount of Appeal Bond.
9. Minute entry of Notice of Appeal in open Court.
10. This praecipe.

THOMAS D. PAGE

Attorney for Appellant. [13]

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[Title of Court and Cause.]

SUPPLEMENTAL PRAECIPE.

To the Clerk of the above entitled court:

The appellant named respectfully requests that you prepare and properly certify the following paper in addition to those already prepared for the purpose of appeal of the above cause to the United States Circuit Court of Appeals Ninth Circuit, namely:

1. Bond in the sum of Two Hundred Dollars.

THOMAS D. PAGE. [14]

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT  
COURT, TO TRANSCRIPT OF RECORD.

United States of America,  
Western District of Washington.—ss.

I, EDGAR M. LAKIN, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing cause as is required by praecipe, and supplemental praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant herein for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Act of Feb. 11, 1925) for making record, certificate or return, 30 folios at 15¢ .....	\$4.50
Certificate of Clerk to transcript of record.....	.50
	<hr/>
	\$5.00

I hereby certify that the above cost for preparing and certifying record, amounting to \$5.00 has been paid to me by attorney for appellant. [15]

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 22nd day of October, 1935.

[Seal]

EDGAR M. LAKIN

Clerk of the United States District Court, Western District of Washington.

By F. W. MOSES

Deputy. [16]

---

[Endorsed]: No. 8010. United States Circuit Court of Appeals for the Ninth Circuit. Charles Loraine Brymer, Appellant, v. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 24, 1935.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



No. 8010

IN THE <sup>7</sup>

United States Circuit Court of Appeals  
For the Ninth Circuit

CHARLES LORAIN BRYMER,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

Appeal from the District Court of the United States for the  
Western District of Washington, Northern Division.

BRIEF OF APPELLANT.

THOMAS D. PAGE,

515 Third Avenue, Seattle, Washington,

*Attorney for Appellant.*

FILED

MAR 3 - 1936

PAUL P. O'BRIEN,

CLERK



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No. 8010

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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CHARLES LORAINÉ BRYMER,

*Appellant,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

Appeal from the District Court of the United States for the  
Western District of Washington, Northern Division.

**BRIEF OF APPELLANT.**

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**STATEMENT.**

The petitioner and appellant, Charles Lorainé Brymer, is an alien and filed his petition for citizenship in the District Court of the Western District of Washington, Northern Division at Seattle.

Appellant was born in York County, N. B., Canada, on November 30, 1874. Appellant first entered the United States through the State of Maine during the year of 1892. That thereafter and on November 9, 1895, petitioner was sentenced to the Colorado state penitentiary at Canyon City for a period of eight years upon conviction of voluntary manslaughter. The District Judge, however, does not certify that the conviction was for voluntary manslaughter, but certifies that to his knowledge and recollection petitioner

testified that he had been convicted of the crime of involuntary manslaughter. The petitioner was discharged from the penitentiary on January 30, 1901, by reason of the expiration of his sentence and that thereafter continued to reside in the United States until 1906, when he returned to Canada and re-entered on or about October 20, 1907, through Sumas, Washington, and has continuously resided in Seattle, State of Washington, since said time.

The petitioner was denied citizenship upon the grounds that his entry into the United States on October 20, 1907, was unlawful and in violation of the United States immigration laws in effect at the time of his entry (St. 6, Tr. 8). Several witnesses gave evidence as to petitioner's moral character but as that matter is not now in dispute it will not be discussed in this brief.

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### **SPECIFICATIONS OF ERROR.**

For specifications of error the appellant urges:

#### **I.**

That the District Court erred in making and entering its order of October 7, 1935, denying the petition of petitioner for admission to citizenship in the United States of America, to which order petitioner noted exception and exception allowed.

#### **II.**

That the District Court erred in denying petitioner's application and petition for citizenship in the United States of America.



### ARGUMENT.

The petitioner will concede that the right of an alien to naturalization is a privilege accorded by the People of the United States, as declared through its statutes, and further that naturalization laws will and should be construed strictly as against the applicant for citizenship.

*Johannessen v. U. S.*, 225 U. S. 227, 32 St. Ct. 613;

*U. S. v. Ginsberg*, 243 U. S. 472, 37 S. Ct. 422;

*U. S. v. Ness*, 245 U. S. 319, 38 S. Ct. 118.

It will be noted that the District Court Judge denied petitioner the right to citizenship on the sole ground that his entry in the United States on October 20, 1907, was unlawful. The theory upon which this was based is that he had committed a crime involving moral turpitude at the time of entry, basing it upon section two of the Act of February 20, 1907, as incorporated in the Immigration Act of February 5, 1917, as section three.

The petitioner's position is simply this, that his entry in 1891 was lawful and that his re-entry in 1907 was lawful in that he was a citizen of Canada and that by virtue of the laws of February 1, 1924, subdivision F, paragraph One, Section 13-B, Act of 1924; and the further ground that he was only temporarily out of the United States, the record being silent as to any intent to give up his residence of practically sixteen years in the United States at the time he returned to Canada in 1906, and therefore had not been guilty of a crime committed prior to entry.

*U. S. v. Linklater v. Commissioner of Immigration at Ellis Island*, 36 F. (2d) 239.

Petitioner is cognizant of the case of *In re Scriver*, 9 Federal Supp. 478, in which a petitioner was denied citizenship on similar ground to that stated by the Court in this case; however, it will be noted that the question at issue in the *Scriver* case is whether an alien, against whom a warrant of deportation is outstanding, is entitled to become a naturalized citizen. It will be further noted that petitioner's visit to Canada in the *Scriver* case was in 1929 and subsequent to the passage of the Immigration Acts of 1917 and 1924, respectively.

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#### CONCLUSION.

The petitioner is now a man of advanced years and is shown to have been a resident of the United States practically continuously from 1891, or for a period of forty-four years, all his property and friends are situated in the United States.

While it is conceded that the matter of citizenship is a privilege, nevertheless, a long continued residence, together with evidence of good moral character for many years, should be given the utmost consideration, and petitioner should not be denied citizenship on technical grounds.

We therefore submit that petitioner should have been granted citizenship.

Respectfully submitted,

THOMAS D. PAGE,

*Attorney for Appellant.*

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IN THE  
UNITED STATES CIRCUIT  
COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 8010

CHARLES LORAIN BRYMER,

*Appellant,*

—vs.—

UNITED STATES OF AMERICA,

*Appellee.*

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Upon Appeal From the District Court of the United States  
For the Western District of Washington,  
Northern Division.

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HON. EDWARD E. CUSHMAN, *Judge*

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

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STATEMENT OF THE CASE

Charles Loraine Brymer, an alien, first arrived in the United States in 1892. On November 9th, 1895, he was convicted by a jury in the District Court of Park County, State of Colorado, of the crime of voluntary manslaughter, and by the said Court was sen-

tenced to the Colorado State Penitentiary to be confined there for a term of eight years. He was discharged from said penitentiary on January 30th, 1901, by reason of the expiration of his sentence.

The Immigration Act of February 20th, 1907, provided in Section 2 thereof that any person who had been convicted of a felony or other crime or misdemeanor involving moral turpitude should be excluded from admission to the United States. This same provision was re-enacted in the *Act of February 5th, 1917*, Ch. 29, found in Title 8 U.S.C.A. 136, par. "e". Brymer re-entered the United States on October 20th, 1907. On that date the *Act of February 20th, 1907* was in full force and effect. He has resided here continuously since that date.

The Court denied appellant's petition for citizenship on the ground that his re-entry into the United States on October 20th, 1907, was unlawful and in violation of the United States Immigration Law in effect at the time of said entry.

## AUTHORITIES

The petition in this case is based on the appellant's re-entry into the United States on October 20th, 1907, (Tr. 1, par. 5). Prior to that time he had been convicted of a felony, to-wit, voluntary manslaughter, (Tr. 9). His re-entry was, therefore, unlawful and cannot

be the basis of a petition for naturalization. If he had made it known to the inspectors that he had been convicted of the crime of manslaughter, he would not and could not have been permitted to enter. (*Act of February 20th, 1907.*)

Appellant's entire contention, as counsel construes his brief, is that, having committed the felony in the United States and then returned to Canada, his first entry having been lawful, his subsequent departure from this country and return to the country of his nativity could not take away his right to remain in the United States. The Supreme Court of the United States has ruled squarely on this issue adverse to appellant:

"We accept the view that the word 'entry' in the provision of section 19 which directs that 'any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; . . . shall, upon the warrant of the Secretary of Labor, be taken into custody and deported,' includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." *United States ex rel Volpe v. Smith*, 289 U. S. 422."

Our own Circuit Court has so ruled.

*Bendel v. Nagle*, 17 Fed. (2d) 719;

*Weedin v. Tayokichi Yamada*, 4 Fed. (2d) 455.



That the crime of voluntary manslaughter is a crime involving moral turpitude has likewise been adjudicated.

*Weedin v. Tayokichi Yamada*, 4 Fed. (2d) 455.

*Pillisz v. Smith*, 46 Fed. (2d) 769;

*United States ex rel Sollano v. Doak*, 5 Fed. Supp. 561.

Under the adjudicated cases, therefore, appellant entered the United States unlawfully and is subject to deportation.

That a person convicted of a crime involving moral turpitude is not eligible to citizenship has been adjudicated frequently.

*In re Ross*, 188 Fed. 685;

*In re Caroni*, 13 Fed. (2d) 954.

That his unlawful re-entry precludes appellant from citizenship can hardly be questioned.

*Subhi Mustafa Sadi v. United States*, 48 Fed. (2d) 1040.

The Statutes on naturalization are specific:

“No declaration of intention shall be made by any alien under this chapter, or, if made, be valid, until the lawful entry for permanent residence of such alien shall have been established, and a certificate showing the date, place, and manner of his arrival shall have been issued; except that no such certificate shall be required if the entry was on or

before June 29, 1906.” (*Act of March 2nd, 1929, Ch. 536, 8 U.S.C.A. 377b.*)

## CONCLUSION

Under the Statutes of the United States, therefore, and the adjudicated cases, appellant as a matter of law was not and is not entitled to citizenship, and the judgment of the lower court must be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,  
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